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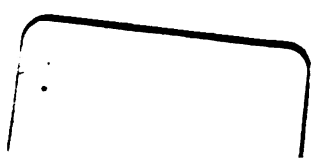

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THE

REVISED REPORTS

BEING

A REPUBLICATION OF SUCH CASES

IN THE

ENGLISH COURTS OF COMMON LAW AND EQUITY,

FROM THE YEAR 1785,

AS ARE STILL OF PRACTICAL UTILITY.

L... N...

EDITED BY

SIR FREDERICK POLLOCK, BART., D.C.L., LL.D.,

OF LINCOLN'S INN,

ASSISTED BY

O. A. SAUNDERS, J. G. PEASE, AND ARTHUR B. CANE,

(EQUITY CASES). (COMMON LAW CASES).

ALL OF THE INNER TEMPLE.

...I... OF THE N... Y...

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1846—1848.

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PREFACE TO VOLUME LXXVI.

C. P. Cooper's collection "temp. Cottenham" has preserved for us, notwithstanding its title, several cases of much earlier date. *Natusch* v. *Irving*, p. 54, and *Lashley* v. *Hog*, p. 64, contain important judgments of Lord Eldon's; the latter was a Scottish appeal, and in 1804 the reporting in the House of Lords was still rather casual; but the former was in the Court of Chancery, and it is not easy to see why it was not reported in the regular course. It was perhaps an excess of caution or piety on Mr. C. P. Cooper's part to report the Vice-Chancellor's refusal to compel a defendant to carry on a public-house (*Hopner* v. *Brodripp*, p. 1); but we are thankful for the spectacle of Lord Langdale gravely considering whether publication of the statutes of an Oxford college should be restrained by injunction (*Magdalen College* v. *Ward*, p. 13). Not only the statutes but the accounts of the Colleges are now public documents.

Colman v. *E. C. R. Co.*, p. 78, is one of the earlier leading cases on the right of a shareholder in a corporation to restrain its governing body from exceeding their powers. Trustees who do not read the settlement they undertake to administer, or get a competent adviser to read it for them, might, if they were not even less likely to read the reports, find a salutary warning in *Fenwick* v. *Greenwell*, p. 154. Some details of an early Victorian variety entertainment are set forth in the notes to *Russell* v. *Smith*, p. 262, a musical copyright case otherwise of no great interest. In the dramatic song in question, the passengers in a drifting boat are made to sight a vessel to leeward, which thereupon bears down upon them: a feat of which the learned reader who has made any acquaintance with

sea-terms will perceive the magnificence. But an audience in the parish of St. Helen, Bishopsgate, presumably was not nice in such matters.

Humble v. *Hunter*, p. 291, decides the neat point that a party who contracts expressly as "owner," or by some other description importing that he is the real principal, cannot be admitted to prove that he was an agent so as to enable his undisclosed principal to sue on the contract. There has been judicial criticism of *Clayards* v. *Dethick* (p. 305) by the late Lord Bramwell; the idiosyncrasies of his views about negligence are well known to students of the decisions reported in the latter part of the nineteenth century. He deliberately held that if a man takes the smallest fresh risk in order to escape from a dangerous or costly situation into which another's negligence has brought him, such action is in the nature of contributory negligence and deprives the party of all right to compensation for resulting damage. That, however, is not the prevailing opinion. *Humphries* v. *Brogden*, p. 402, is a leading decision on the right to support for one's land, in this case as between the surface-owner and a subjacent mine-owner. Some branches of the subject are still not so clear as might be wished. *Wait* v. *Baker*, p. 469, contains an instructive judgment of Baron Parke's on the appropriation of specific goods to an originally non-specific contract of sale. *Buron* v. *Denman*, p. 554, is one of the small but important class of authorities on "acts of State." It used to be said that the "numerous pleas" mentioned in the report, or some of them, were drawn by the late Sir James Shaw Willes, then at the Bar (whose name, however, does not appear), and included such allegations as that in the *locus in quo*, to wit, the Gallinas on the west coast of Africa, there was an ancient and laudable custom to burn slave-dealers' barracoons; and, alternatively, that there was no law at all. We do not doubt that the record is extant, but we doubt the wisdom or piety of attempting to verify legends of this kind.

Molton v. *Camroux*, p. 669, was, before the later decision of the Court of Appeal there referred to, the principal authority, and the only modern one of much importance, on the position of a man who contracts with a lunatic, reasonably believing him to be sane; and it is still perfectly good. *Freeman* v. *Cooke*, p. 711, is a well-known case, adding further precision to the rule of estoppel laid down in *Pickard* v. *Sears*. The subject has grown more and more important in modern law, and a learned Canadian writer, Mr. Ewart, K.C., has gone near to claiming the whole Common Law for its province. Finally, in *Jones* v. *Chapman*, pp. 794, 798, there emerges from a wrangle over the construction of the unlucky New Rules of 1834 a luminous *dictum* of Maule, J., on the determination of legal possession when physical control is doubtful or interrupted. Maule, J. was not innovating, but following Littleton, s. 701.

F. P.

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OF THE

HIGH COURT OF CHANCERY.

1846—1848.

(9 & 10 Vict.—11 & 12 Vict.)

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VOL. LXXVI.

CHANCERY.

HOPNER *v.* BRODRIPP.

1840.
May.

(1 Coop. temp. Cott. 89.)

SHADWELL, V.-C.
[89]

The Court cannot compel a lessee to observe a covenant involving the continuous performance of a positive obligation, though the lessee may be restrained by injunction from violating a covenant imposing negative obligations.

THE defendant was the lessee under the plaintiff of a public-house. The lease contained a covenant that the defendant would use and keep open the premises as a public-house, provided the proper licenses could be obtained; and that he would use his best endeavours to obtain a renewal of the license from time to time; and that he the defendant would not do, or cause, or permit, or suffer to be done, any acts whatever whereby the license might become forfeited or be refused. The business of the public-house having become unproductive, the defendant determined to discontinue it, and the plaintiff thereupon filed his bill, and obtained from the VICE-CHANCELLOR an injunction *ex parte* to restrain the defendant from discontinuing to use and keep open the premises as a public-house, and from discontinuing to renew the license, provided the same could be obtained.

A motion was made to dissolve the injunction, upon the ground that a court of equity cannot enforce by a negative order, what it cannot enforce by a positive order.

The VICE-CHANCELLOR said that the observation was just. The Court ought not to have granted an injunction restraining the

HOPNER v. BRODRIPP.

defendant from discontinuing to use and keep open the premises as a public-house, and from discontinuing to renew the license, provided the same could be obtained. That that was tantamount to ordering him to carry on the business of a public-house keeper, and was a species of order that the Court had no jurisdiction to make. That he had, however, no doubt whatever of the jurisdiction of the Court to restrain a party from doing such acts as he had undertaken not to do, although it might not be able to compel him to perform the acts, which he had undertaken that he would perform. The subjects of jurisdiction were wholly distinct. Here the injunction was undoubtedly wrong: but it would have been right, if it had restrained the defendant from doing or causing, or permitting or suffering to be done, any acts whereby the license might become forfeited or be refused.

1845. *July.*

Lord LYNDHURST, L.C.

[196]

WINTHROP *v.* WINTHROP.

(1 Coop. temp. Cott. 196—205.)

Construction of the bequest of an annuity when the annuitant should be legally declared incapable of managing her own affairs.

THE testator by his will, dated December, 1844, after reciting that his wife, Frances Winthrop, was then resident at an asylum for the reception of lunatics, and had been for some years past in a weak state of mind, and it was doubtful whether she would be capable of managing her own affairs, and that he was therefore desirous of making a provision for her, bequeathed unto his trustees a sum of 26,000*l.*, 3*l.* per Cents., upon trust that they should, when his said wife should at the cost of the said fund be legally declared to be in a state incapable of managing her own affairs, apply the annual sum of 500*l.* out of the dividends in such manner as they should think best, for the benefit, maintenance, and support of his said wife; but if his said wife should be declared capable of attending to, and managing her own pecuniary affairs, then upon trust that his said trustees should, whilst his said wife should so continue capable, pay the whole of the dividends of the said sum of 26,000*l.* unto his said wife for her own absolute benefit; and the said testator declared, that so much of the dividends of the said sum of 26,000*l.* as should not during the life of his said wife, under the trusts declared as aforesaid, be applied for her benefit, should fall into and form part of his residuary personal estate.

Numerous married women and infants, residuary legatees of the testator, were the plaintiffs, and the widow and trustees were the defendants, in the suit.

Mr. Cooper and *Mr. Rolt*, for the plaintiffs, said that they as residuary legatees were entitled, in case the defendant Frances Winthrop should be declared to be in a state incapable of managing her own affairs, to so much of the dividends of the 26,000*l.* as exceeded the annual sum of 500*l.*, and that the only question was, in what way it should be ascertained whether the defendant Frances Winthrop was incapable, or capable, of attending to and managing her own pecuniary affairs. That the family was extremely anxious that no commission of lunacy should issue, but that the decree should direct the Master, to whom the cause might be referred, to make an inquiry upon the subject. [197]

Mr. Wood and *Mr. Freeling*, for the defendant Frances Winthrop, said that at the time when she had been placed in a lunatic asylum she was incompetent to manage her own affairs, but that she was now fully recovered from her unsoundness of mind.

Mr. Rudall for the defendants the trustees.

Lord LYNDHURST said, that any inquiry to be directed by him in this suit, either before the Master or otherwise, would be necessarily directed by him as a Judge in equity. But the LORD CHANCELLOR, sitting in equity, had no power himself to pronounce any decision upon the capacity, or incapacity, of a party, and of course could not confer any such power on the Master—if that decision was to be made the ground of depriving a party of any part of his income. It was a common-law question, and must be determined on that side of the Court by a commission, and an inquisition in the usual way. He should declare the defendant Frances Winthrop, entitled to all the dividends of the 26,000*l.* until she should have been found of unsound mind upon the return to a commission of lunacy.

The decree declared that, upon the true construction of the will of the testator, the defendant Frances Winthrop was not to be considered as legally declared to be in a state incapable of managing her own affairs, unless she should be *declared of unsound mind upon the return to a commission to be issued in lunacy to inquire into the state of her mind. And that until she should be so found [*198]

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of unsound mind, and for such period of time as she should not be found to have been of unsound mind, she was to be deemed capable of attending to and managing her own pecuniary affairs, within the intent and meaning of the said will, and entitled to all the benefits given her by the will in the event of her being declared capable of attending to and managing her own pecuniary affairs, and having regard to the directions of the will, and with reference to the benefits thereby given to the said defendant Frances Winthrop.

1846. *July* 24.

CHUCK *v.* CREMER (1).

(1 Coop. temp. Cott. 205—206.)

Lord COTTENHAM, L.C.

In general a party in contempt cannot take a proceeding in the cause for his own benefit.

[205]

THE defendant moved before the Vice-Chancellor of England that an injunction granted *ex parte* might be dissolved. His application being unsuccessful, he gave notice of motion by way of appeal. Previously to the notice of the appeal motion being given, an attachment was issued against the defendant, who was abroad, for not having put in his answer.

Upon the motion being opened, it was objected that the defendant was in contempt and could not be heard.

The LORD CHANCELLOR said, he was of opinion that the appeal motion could not proceed. That a party was entitled to be heard, if his object was to get rid of the order, or other proceeding, which placed him in contempt, and he was also entitled to be heard for the purpose of resisting or setting aside for irregularity, any proceedings subsequent *to his contempt; but he was not generally entitled to take a proceeding in the cause for his own benefit. That there were exceptions to the last rule, but they were few in number.

[*206]

Mr. Bethell, *Mr. Rolt*, and *Mr. Harwood*, for the plaintiff.

Mr. James Parker and *Mr. Daniell*, for the defendant.

(1) *Gordon* v. *Gordon* [1904] P. 163, 73 L. J. P. 41, 90 L. T. 597.—C. A.

GREEN *v.* GREEN.

1828.
August.

(1 Coop. temp. Cott. 206; S. C. 2 Sim. 394.)

SHADWELL, V.-C.

A party may be heard to show irregularities in the process upon which he is committed, although he has not obeyed the order in respect of which the process was issued.

[206]

[IN this case,] for many years familiarly known to the profession as the case of *The Wakefield Butchers*, there was an order for a receiver of certain premises at Wakefield used as a butcher's shop, and the defendants being in the occupation of the premises, the order directed that they should give up possession to the receiver. The receiver having been appointed, notice was given to the defendants to deliver up the possession to him, and this notice not being attended to, applications were made to the Court, and process was thereupon issued, the result of which was, that the defendants were committed to the Fleet; but their families, and persons in their employ, still remained in possession of the butcher's shop. The process not having been regular, a motion was made on the behalf of the defendants, that they might be discharged out of custody, when it was objected that the defendants ought, in compliance with the order, to give up possession to the receiver before they could be heard upon the notice of motion. But the VICE-CHANCELLOR said he was clearly of opinion that the defendants were entitled to be heard to show the irregularity of the process under which they had been committed, although they had not obeyed the order by giving up possession to the receiver. The counsel for the defendants were accordingly heard upon the motion, when the process was set aside, and the defendants were discharged out of custody, and the plaintiffs were ordered to pay all the costs.

ELLICE *v.* WALMSLEY.

1835.
Jan.

(1 Coop. temp. Cott. 207.)

SHADWELL, V.-C.

A party in contempt cannot apply for the costs of an abandoned motion.

[207]

THE plaintiff gave a notice of motion, and filed affidavits in support: but neglecting to instruct counsel, in due time, the defendant applied under the General Order of the 5th of August, 1818, and obtained the costs of an abandoned motion, to be taxed by the Master. At this time the defendant was in contempt for want of an answer, and a motion was made upon that ground

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to discharge the order, which gave to him the costs of the abandoned motion. The COURT said, that the application for the costs of the abandoned motion was virtually the same thing as a motion; and as the rule was that a party in contempt could not in general take any aggressive proceeding, the order made upon that application must be discharged.

1836. *Jan.*

BARKER *v.* DAWSON.

(1 Coop. temp. Cott. 207.)

Lord COTTENHAM, L.C.

Distinction, where irregular order obtained prior, and where obtained subsequent, to the contempt.

[207]

THE defendant was for some reason in contempt, and the plaintiff having obtained an order that he should pay money into Court, the defendant moved that such order might be discharged for irregularity, when the plaintiff objected that the defendant being in contempt could not be heard. Lord COTTENHAM said the rule never had been, that where an irregular order was obtained against a defendant in contempt, the defendant must clear his contempt before he could come to get rid of that irregular order. That there was a wide distinction between a case where the order alleged to be irregular was obtained prior to the contempt, and where it was obtained subsequent to the contempt. That where it was obtained prior to the contempt, and was not the order which placed the party in contempt, the rule was that the contempt must be cleared before the party could make any application to the Court. But he never would extend the rule to a case where the order, sought to be set aside on the ground of irregularity, was made subsequently to the contempt. That such an extension of the rule would place the party in contempt too much at the mercy of his adversary.

1838. *July.*

PARRY *v.* PERRYMAN.

(1 Coop. temp. Cott. 207—208.)

Rolls Court.

Lord LANGDALE, M.R.

Case where the party in contempt is merely protecting himself.

[207]

[LORD LANGDALE:]

You cannot, being in contempt, be heard here upon other matters. That is the general rule, to which there are some exceptions. One exception is, where the party in contempt is merely

protecting himself. He may be heard to that extent, and no further. But there is nothing to prevent you taking what steps *you please, if your object be confined to getting rid of whatever has placed you in contempt.

PARRY v. PERRYMAN. [*208]

NEEDHAM *v.* NEEDHAM (1).

(1 Coop. temp. Cott. 208.)

1845. *Jan.*

Lord LYNDHURST, L.C.

Motion, under the circumstances, dismissed with costs; the defendant being in contempt for non-payment of costs of a like motion.

[208]

THIS was a motion on the part of the defendant by way of appeal to discharge orders of the VICE-CHANCELLOR OF ENGLAND and Vice-Chancellor WIGRAM. Upon the motion coming on to be heard, it was objected that a similar motion had been refused with costs, and that the defendant was in contempt for the non-payment of those costs, when it was asked that the motion might stand over, in order to give an opportunity of paying the costs and clearing the contempt.

Lord LYNDHURST said that that was an indulgence, which in general he should not refuse. But that in this case there had been already several similar motions, and the defendant had himself made the last motion in person, when the rule of the Court was explained to him, which forbids the renewal of a motion of this kind by a party, who has not obeyed the order of the Court, by indemnifying his opponent for the costs of the last motion. The defendant having, notwithstanding this, brought on a new motion, leaving the costs of the last motion unsatisfied, it was not a case for any indulgence, and he should refuse the motion, and of course refuse it with costs.

HAWKINS *v.* HALL.

(1 Coop. temp. Cott. 210—211; S. C. 1 Beav. 73.)

1838. *Dec.* 20. 1839. *Feb.* 11.

Rolls Court.

Lord LANGDALE, M.R.

[210] [*211]

[IN this case] the plaintiff appears to have been an outlaw, but coming to England he was arrested under an attachment for non-payment of costs; and a motion being made on his behalf to set aside the attachment for irregularity, it was objected that he was an outlaw, and could not be heard in a *court of justice. Outlawry,

(1) The reporter was one of the counsel in the case.

HAWKINS v. HALL.

it was said, was a more serious objection than a mere contempt. The MASTER OF THE ROLLS said that the question was whether the plaintiff was entitled to make the application, he being under outlawry. That he conceived that an outlaw was not entitled to come into a court of justice to establish a demand of his own; but that was not then the question; for the proceeding against the outlaw was in the nature of a penal proceeding for non-payment of costs: and the question was whether, when a party had been improperly detained, he had not a right to come into Court, to get rid of the irregular proceedings. He did not come to establish a demand, but to complain that injustice had been done by the party proceeding against him, or, in other words, that the power of the Court had been used improperly against him. Whatever was the case formerly, in the present day an outlaw was entitled to the benefit of the law for his personal protection; and he must therefore be entitled to apply to a court of justice, to remove an irregular order by which he was improperly detained.

1844. *Nov.* 25.
1845. *Nov.* 10.

MORRISON *v.* MORRISON.

(1 Coop. temp. Cott. 212—217; S. C. 4 Hare, 590.)

WIGRAM, V.-C.
[212]
[*213]

[IN this case] the Master had made his general report, and an order *nisi* to confirm it was served on the defendants. One of the defendants, on behalf of himself and as the guardian of three other defendants who were infants, took *exceptions to the report, and the usual order was made to set down the exceptions. The defendant was at the time in contempt for the non-payment of the costs of a petition in the cause; and a motion was thereupon made to discharge the order for setting down the exceptions, and that the exceptions might be taken off the file, on the ground that a party in contempt could not take any step in a cause, until he had cleared his contempt. Vice-Chancellor WIGRAM said a party in contempt was entitled, notwithstanding his contempt, to appear and resist any proceedings taken against him in the cause. In that case the step, taken by the defendant in filing the exceptions, was purely in the way of resistance. If the order to set down the exceptions were necessary for the purpose of preventing the confirmation of the report, that step also must be considered as a proceeding taken merely in his own defence, and would be therefore regular.

In the same case of *Morrison* v. *Morrison*, the same defendant in

his own name, and in the names of the three infant defendants whose guardian he was, presented a petition, which * * prayed that the Master's report might not be confirmed, and that it might be declared to be irregular and void and might be discharged; that the petitioners might be at liberty to object to items in the schedules to a certain former report of the Master, or in the accounts of the consignee, in the same manner as if the same had never been allowed; and that they might be at liberty to prosecute certain orders made in the cause many years ago; and that the Master might be directed to take the accounts of a manager in the West Indies; and that such declarations and directions might be made and given as should be necessary for ascertaining and settling the principle upon which the accounts of the consignee should be taken. The petition also prayed that other special directions with regard to the accounts might be given, or that certain alternative relief might be given upon the petition and the exceptions.

[215]

Upon the petition coming on to be heard it was submitted, as a preliminary objection, that if the Court should hold that the adult petitioner might be heard on a petition in the nature of a defence notwithstanding his contempt; yet that if the petition sought other relief than was purely defensive the Court would refuse its prayer, and would not in that case grant even that relief, which the petitioner might, if he had confined himself simply to matters of defence, have obtained.

The Vice-Chancellor WIGRAM said, that without hearing the petition it would be very difficult for the Court to determine, whether it sought to do more than defend the rights of the petitioners in respect of the matters in question. He would reserve the objection and dispose of it after the petition had been heard. In giving judgment on a subsequent day his Honour said, it was objected that, although the adult petitioner, being in contempt, might have petitioned to have been relieved against some of the *proceedings, as by part of the relief prayed on the petition he had asked, yet he had asked further relief totally unconnected with that partial relief to which he was entitled: and that, by the principle said to be established by a case referred to, the petitioner having asked more relief than the Court would give to a party in contempt, the Court would not merely disregard the part, which he ought not to have applied for, but would dismiss the whole; that he had therefore anxiously considered that part of the case. That in

[*216]

MORRISON v. MORRISON.

Mr. Daniell's note of the case of *Wilson* v. *Metcalfe* (1) the proposition was certainly stated with great breadth; but the facts of the case appeared to be these. The defendant had applied to the Court to discharge an order on which his contempt was incurred, including in his notice of motion the discharge of several subsequent orders in which he had likewise incurred further contempts: and Lord COTTENHAM was of opinion that he ought in the first instance to be confined in argument to that part of the notice of motion, which asked to discharge the order on which his first contempt was incurred; and his application in that respect not being sustainable, his Lordship refused to hear the residue of the motion. That it would seem that the case did not decide more than this, that where a party was in contempt on several distinct grounds, the Court would put him to discharge himself from his contempt altogether and not piecemeal; but that was not the case there. The petition asked that certain accounts of the manager of the estates might be taken, a matter altogether free from and totally unconnected with the subject of the contempt. Whether that relief was, or was not, an extension of the relief for which a party in contempt might apply, it appeared to him that it did not bring the case within the principle of *Wilson* v. *Metcalfe*. * * *

[217] In this same case of *Morrison* v. *Morrison*, it was submitted as a separate preliminary objection and so treated by the Court, that the Court would put the adult petitioner under the terms of previously paying the costs of the former petition, which had been dismissed with costs, and which, it is to be inferred, was alleged to be in substance the same as the new petition.

Vice-Chancellor WIGRAM, with regard to this objection, said that without hearing the petition it would be very difficult for the Court to determine whether the petition was a renewal of, or embraced the same matters as, the petition which had been dismissed, and he reserved the objection. In giving judgment on a subsequent day his Honour said, the objection was that the costs of a former petition, presented in that branch of the Court, and which was dismissed with costs, had not been paid: and it was said that Lord LANGDALE, in a case before him of *Needham* v. *Needham*, had refused to hear Colonel Needham on a second petition till he had paid the costs of the first. That it might be a safe and proper practice, if a party could pay the costs, which he was liable to pay, that such payment should be made the condition of hearing him on

(1) Daniell's Chancery Practice.

another similar application. That on reading the petition in the case before him he thought it was impossible not to consider that that was not a case, to which Lord LANGDALE would have applied that rule. That the insolvency of the father of the petitioner, and the absence of any property in the son except that which the son took from the father, appeared to him to be made out in the evidence sufficiently to induce him not to apply such a rule.

PLUMBE *v.* PLUMBE.

(1 Coop. temp. Cott. 221; S. C. 3 Y. & C. Ex. Eq. 622.)

1839. *Nov.* 8.

Lord ABINGER, C.B.

[221]

[IN this case] there was an attachment against the plaintiff for the non-payment of the costs of a motion; and the plaintiff moving for the production of documents admitted by the answer to be in the defendant's possession, it was objected that the plaintiff could make no motion without clearing his contempt. Lord ABINGER said that if the plaintiff was entitled to compel an answer, he was also entitled to all the incidents of the answer; and therefore the decision, which had been cited, of *Wilson* v. *Bates* (1) went the full length of justifying the motion.

RE WATKINS.

(1 Coop. temp. Cott. 225.)

1846. *July* 25.

Lord COTTENHAM, L.C.

[225]

Reluctance with which a stranger is appointed committee of a lunatic, who has relations.

THIS was a petition for the appointment of a stranger committee of the person and estate of the lunatic.

The LORD CHANCELLOR said, he was always reluctant to make such an order. That the practice in modern times was not to confer this office upon one, unconnected with the lunatic by blood or affinity. There must be an affidavit stating in detail those circumstances, which might enable him to judge of the necessity, that it was alleged existed, in a case in which it appeared the lunatic had relations, of nevertheless selecting a stranger. Until those circumstances were before him he would not make the order.

Mr. Brett appeared in support of the petition.

(1) 45 R. R. 254 (3 My. & Cr. 197).

1846.
July 25.

Lord COTTENHAM, L.C.

RE ADEY.

(1 Coop. temp. Cott. 225.)

No order for satisfaction of a liability of a lunatic until information furnished, showing that enough will still be left for his maintenance.

[225]

THE property of the lunatic was small, and it was sought by the petition that part of it might be applied in satisfaction of a liability of the lunatic.

The LORD CHANCELLOR said, that it did not appear upon the petition that the income of the lunatic was more than sufficient for his maintenance; and, as the result of his granting the prayer of the petition would be to reduce that income, he must decline to make the order desired, until furnished with information, showing that after the proposed payment, enough would still be left for the lunatic's proper support and maintenance.

Mr. Rogers for the petition.

1846.
July 31.

Lord COTTENHAM, L.C.

RE STAIR.

(1 Coop. temp. Cott. 227—228.)

In lunacy any order, which the circumstances shown by the evidence render expedient, may be made without an amendment of the petition.

Security for the return of a lunatic permitted to go out of the jurisdiction must be of a kind available in the Courts of this country.

[227]

THE petition was for a *supersedeas*, on the ground that the lunatic was recovered; but that ground failing, it was proposed that the petition should be amended by praying that the lunatic, who was a native of Scotland, might be permitted to visit that country. Her nearest relation—a brother—who was resident, and
[*228] a considerable landowner *there, being willing to give security that she should, when required, return within the jurisdiction.

The LORD CHANCELLOR said, that in lunacy he could make any order, which the circumstances shown by the evidence rendered expedient, and that the expense and delay of amendment need not be incurred. But he could not allow the lunatic to be taken out of the jurisdiction, unless security for her return, to be approved of by the Master, should be previously given; and such security must be of a kind that would be available here. Security that could only

be enforced in a foreign Court, and for this purpose the Scotch Courts must be considered as foreign, would not be sufficient. Re STAIR.

Mr. Teed, Mr. Romilly, Mr. James Parker, Mr. Willcock, Mr. Shapter, and *Mr. Anderson* for the different parties, the petitioner and the respondents.

RE LANGHAM.

1846. *July* 31.

(1 Coop. temp. Cott. 228.)

Lord COTTENHAM, L.C.

[228]

General rule that the committee of a lunatic's estate, exceeding his authority in the expenditure of money, shall himself pay the costs of the additional reference thereby occasioned.

THE Master had recommended that 700*l.* should be laid out in repairing and enlarging a farm house, but the committee had expended 1,300*l.*; and this a petition for a reference as to the propriety of such additional expenditure.

Mr. Bacon for the petition.

The LORD CHANCELLOR said, that he had formerly laid it down as a general rule, that a committee thus exceeding his authority should himself pay the costs of the additional reference thereby occasioned. That he did not know whether such a rule had been observed of late, but he desired it to be understood that it was his fixed intention to adhere to it. There might in this case be an order for the reference, and when the matter came back upon the Master's report, he should see whether there was any ground for a departure from the rule.

MAGDALEN COLLEGE *v.* WARD.

1839. *December.*

(1 Coop. temp. Cott. 265—274.)

Rolls Court.

Lord LANGDALE, M.R.

[265]

Injunction granted *ex parte* to restrain the publication of the statutes of Magdalen College, Oxford.

The same dissolved upon the facts stated in the answer.

Principle upon which an *ex parte* injunction is granted.

THE bill stated that in 1457 his late Majesty King Henry the Sixth granted his Royal licence to the Right Reverend Father in God William Patten, then Bishop of Winchester, and called William of Waynfleet, to found a College in the said University of Oxford, and said William Patten accordingly founded said College called

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St. Mary Magdalen. That said William Patten compiled certain statutes for the regulation and government of said College, which in 1479 he gave to the then President and scholars of the said College; and said statutes had been ever since kept at said College, and the same were the private and exclusive property of said College; and the regulation and government of the said College had ever since been conducted and carried on in pursuance of and in conformity with said statutes. That said statutes were written in the Latin language, and were in manuscript at the time when they were so given to said College as aforesaid, and the same had never been printed or published; but copies in manuscript had been made for the use of the President and Senior Fellow of said College, and a copy in manuscript appeared to have been deposited among other documents and archives belonging to the said University in the Bodleian Library at Oxford aforesaid, but when or by whom such copy was so deposited plaintiffs were unable to set forth or discover. That plaintiff Martin Joseph Routh as President, and plaintiffs and the other scholars of said College had in themselves the sole and exclusive property in the manuscripts of said statutes

[*266] and *the custody and safe keeping thereof, for the use and government and regulation of said College; and that no person had a right to print, publish, or divulge the contents of said statutes without the consent of plaintiffs and the other scholars of said College as aforesaid; and great inconvenience and irreparable mischief would ensue to said College and to plaintiffs and the future Presidents and scholars of said College, or those who should have the future government of said College and the management of the affairs thereof, by the publication of the aforesaid statutes. That the defendant was for some time one of the Fellows of Trinity College in said University, but that he had lately been deprived of his Fellowship; and that since he had been so deprived of his Fellowship he had expressed his determination to publish the several statutes relating to the Colleges in said University, and amongst others the statutes of said College of which plaintiffs were the President and scholars as aforesaid. That plaintiffs had lately been informed, as the facts were, that the said defendant had for some time past occupied himself in taking a copy of the aforesaid statutes of the College of St. Mary Magdalen aforesaid from the copy thereof so deposited in the Bodleian Library as aforesaid; and that he had completed the making of such copy and had the same in his possession; and he had translated, or caused to be

translated, into English and had advertised said statutes for publication with an English translation and commentary, and had commenced printing the statutes and the translation thereof, and he threatened and intended forthwith to have the same printed and published with comments thereon. The bill charged that under the circumstances aforesaid the plaintiffs had laid a case before Sir Charles Wetherell for his opinion as to the right of said defendant to publish said statutes, and he had given it as his opinion that the said defendant had no right whatever to publish the same; That such case and opinion were communicated to said defendant on the 11th of that instant month of October, 1839, by plaintiffs *Edward Ellerton and Richard Clarke Sewell, and he was [*267] thereupon requested to desist from printing or publishing said statutes so advertised to be published by him as aforesaid, but said defendant had refused to comply with such request. That defendant had addressed to the plaintiff, Edward Ellerton, a letter, which was as follows: "BODLEIAN LIBRARY, Oct. 12th, 1839. REVEREND SIR,— Since I had the pleasure of seeing you yesterday I have perused Sir Charles Wetherell's opinion on Mr. Sewell's case, returned herewith. I have, with my best attention, looked at the Bodleian statutes and considered the opinion as one of morality and good feeling, and finding no reason of law or conscience against my intention of publishing Magdalen statutes, as the first in a series of all the codes, I am resolved to maintain that intention. As insinuations have been thrown out to the contrary, I may perhaps be allowed to add that I am not going to make any invidious comparisons between the statutes and practice of your house for two reasons, either of them sufficient of itself; first, I know of none, if any such there be, for I have ever disdained to seek after offences; and secondly, because it would be against my general plan, which is, and has ever from the very first thought been, to publish the other codes without any such invidious observations, and to make no exception as to Magdalen College." That said defendant persisted in his avowed intention to print and publish the statutes of the said College of St. Mary Magdalen, and that he had in his possession or power various parts of the said statutes already printed, and the translation thereof, and the proof sheets of other parts thereof. That said statutes had, as before stated, never been printed or published, but still remained the private property of said College, and that the deposit of a manuscript copy of the said statutes in the Bodleian Library, in case the same was deposited

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there, was for the purpose of preservation and safe custody, and not for the purpose of publication; and that the circumstance of a manuscript copy of *the said statutes being found in the Bodleian Library did not entitle the said defendant to copy and print and publish said statutes. That the other scholars of said College were very numerous, and that it would be very inconvenient to make them parties to the suit.

[*268]

The statements and charges in the bill being verified by affidavit, the MASTER OF THE ROLLS on the 21st October, 1839, granted an injunction *ex parte* to restrain the defendant from printing, publishing, or causing to be printed and published, the statutes aforesaid, or any of them or any part thereof, or any translation thereof or of any part thereof, until the defendant should fully answer the plaintiff's bill, or the Court make other order to the contrary.

The defendant on the 14th of December filed his answer to the bill, the material passages whereof were as follows: That in or about the year 1479, the said Wm. Patten, Bishop of Winchester, did deliver, or cause to be delivered, some copies of the aforesaid statutes to the aforesaid College of St. Mary Magdalen, there to be preserved and kept in the manner pointed out by the statutes, and did also deliver, or cause to be delivered to the Senior Dean of said College, a copy of said statutes, with said Wm. Patten's autograph therein, in the words following: "This is the Dean's copy," and that such last-mentioned copy was for many years in the possession of a tenant of said College, and was some time since delivered to the said plaintiff, Martin Joseph Routh, and was then in the possession of *said College. That defendant was unable to set forth whether said copies, or either of them, or whether the original of said statutes for the regulation and government of said College, which as defendant believed was preserved and returned to said Wm. Patten, or whether all the three, ought to be treated and considered as originals (1). That defendant submitted whether, in the circumstances therein appearing, there was any property, or right of property, directly or indirectly in said statutes, save only in or to the parchment, or other material, on which the same was written; but in case this honourable Court should be of opinion

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(1) According to the translation of the statutes published by Mr. Ward, pp. 138 and 139, the founder ordained that in one chest strong and safe, and having three different locks, the original charters and muniments, including the original book of the statutes, should be deposited; and in another chest copies of such charters and other documents, including the statutes and ordinances, should be deposited.

that there was, or could be, any property or right of property, directly or indirectly, in or to said statutes, other than in or to the parchment, or other material, on which the same was written; then defendant submitted that any such property, or right of property, was either in the personal representative of said Wm. Patten, if any such there were, or having been in the said Wm. Patten, the founder or first Visitor of said College, the same since his death had been in the successive Bishops of Winchester, his successors and the Visitors of said College. That manuscript copies of the said statutes had been, as defendant believed, at various times made, advertized, and published; and that one of such copies, which appeared to have been made in the year 1690, was in the British Museum (1); and that there was another manuscript copy of the said statutes in the British Museum. That the defendant had found both the said copies in the British Museum, and that they corresponded *with and were, as he believed, exactly the same [*270] as the one in the Bodleian Library before mentioned, and such two copies formed part of the Harleian collection of manuscripts in the British Museum; and that the printed catalogue of the Harleian collection was published more than thirty years ago, and defendant had no doubt but that a printed copy of such catalogue had been in the Library of such College for more than thirty years; and he submitted that the fact of such two copies being and having been in the British Museum must be presumed to have been known, as the defendant believed the fact to be, to the President and Fellows of said College for at least thirty years (2). That the one

(1) See the next note. There are, as the answer states, two MS. copies of the Magdalen College Statutes in the British Museum. The age of one does not appear to be known. The transcriber, Lord Anglesey, gives us the age of the other—1677, and not 1690.

(2) The Catalogue of the Harleian MSS. here alluded to was printed under the authority of the Commissioners on the Public Records of the Kingdom in 1808, and immediately after publication copies were presented to the Libraries of all the Colleges of Oxford and Cambridge. At the head of this Catalogue is the preface to a catalogue of the same collection, published by order of the Trustees of the British Museum in 1759. That preface is reprinted in C. P. Cooper on the Public Records. It states (see the last-mentioned work, vol. i. p. 82) that the collection contains statutes of the two Universities, and of their several Colleges and Halls. One manuscript is thus described in the Catalogue of 1759: Codex Chartaceus in fol. recenti manu descriptus, in quo nomen suum scripsit Vir præclarissimus Arthurus Annesley, Comes de Anglesey, 17 die Augusti, A.D. 1677, cum hac, quæ sequitur, Epigraphe—"The statutes of Magdalen College, I copyed out of one lent me by my son Richard Annesley, August and September, 1677." The other manuscript is thus described: "The statutes of Magdalen College (Oxford) in Latin." Both these MSS. are described in the same way in the catalogue of 1808.

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of such two copies, if not both, never was in the possession of the said College, and that such two copies had been for many years, and were then, open to the inspection of the public; and that the persons (who were numerous), who had access to the reading room of the British Museum, were allowed to make extracts from or translate the manuscripts therein contained; and that the Trustees of the British Museum claimed and exercised the right of giving

[*271] permission to copy the whole of any given *manuscript in that collection according to their own discretion. That defendant had been informed by the Rev. Dr. Bliss, Keeper of the Archives at the Bodleian, and formerly Under Librarian there, that the Rev. Dr. Rawlinson, once of St. John's College in Oxford, made in his lifetime and also by will and codicil bearing date in or about 1753 or 1754, several donations of books and manuscripts to the Bodleian Library, and amongst them of the copy of said statutes of Magdalen College deposited in such Library; and that such books and manuscripts were under the control of the Librarian of the Bodleian Library, and not of the Keeper of the Archives there; and such copy of said statutes had been since 1754 open to the inspection of all Masters of Arts of the University, and under certain regulations to all the public; and in order to facilitate such inspection of Dr. Rawlinson's books and manuscripts there was a manuscript catalogue of such collection in the Bodleian Library, in which catalogue mention is made of said manuscript copy of said statutes. That defendant was convinced from the statutes themselves, and he therefore submitted to the Court, that the public were interested in the said statutes being made public, inasmuch as they regulated and determined the right to degrees in said College, and other measures in which the public were deeply interested, and such statutes were by one of the clauses thereof directed to be publicly and distinctly

[*272] read amongst *the President, Fellows and scholars of said College at three several meetings in each and every year, and it was directed that no Fellow or scholar of the College should absent himself from the aforesaid meetings. That said statutes were not at any time given to the President and scholars or to said College, and that they were not the private or exclusive property of said College, although a copy or copies thereof were delivered as aforesaid, to be referred to for the regulation and government of said College. That it was submitted to the judgment and decision of the Court whether the University of Oxford in respect of the Bodleian Library had not the sole right of property in the manuscript copy of the statutes

so deposited there; and whether the Trustees of the British Museum had not the sole right of property in the manuscript copies of the said statutes deposited in such Library; or what were the rights of said University and the members thereof in or to said copy in the Bodleian Library; and what were the rights of the said Trustees and the public in or to the copies of said statutes in the British Museum. That it was submitted that any person had a right to print, publish, or divulge the contents of the statutes in the bill mentioned without the consent of said plaintiffs and the other scholars of said College. That defendant was for six years a Fellow of Trinity College in said University of Oxford; and that towards the latter end of 1834, when the statutory time, as was alleged, had arrived for his electing either to take Holy Orders or not, he, defendant, had a right (1) to continue as a Lay Fellow, and appealed to the Visitor, who stated that within a reasonable time he must elect to take Orders or resign his Fellowship; and on Trinity Monday, 1835, in the Chapel of said College and in the presence of the Collegiate Body, he, the defendant, did decline to take Holy Orders and did tender the resignation of his Fellowship, since which period said Visitor had declared that defendant did then cease to be a Fellow. That (other than and save as aforesaid) he had not lately or at any time been deprived of *his said Fellowship. That besides the copy of the statutes of Magdalen College thereinbefore mentioned there were in the Bodleian Library copies of the statutes of other Colleges as well of the University of Cambridge as of the University of Oxford (2). That the deposit of a manuscript copy of said statutes in the Bodleian Library, in case same was deposited there as mentioned in the bill, was not for the purpose of preservation and safe custody, but on the contrary defendant submitted and insisted that such deposit as aforesaid in the Bodleian Library was for the purpose of public inspection and information; inasmuch as all the books and manuscripts in the Bodleian Library are there for the purpose of public inspection, and extracts, copies, and translations thereof were continually

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(1) The sense does not seem apt. One would expect words to the effect of "contended that he had a right."—F. P.

(2) Mr. Ward, when he filed his answer, does not appear to have been aware that Hearne published in the Appendix to one of his numerous works the statutes of Oriel College — Ordinationes Collegii Orielensis. E codice MS. veteri penes Editorem. The writer has seen old MS. copies of the statutes of most of the Colleges of Oxford and Cambridge in repositories public and private, quite beyond their control. The statutes of several of the Colleges of Cambridge had been published long before the date of Mr. Ward's answer.

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permitted to be taken, and as defendant believed always by Masters of Arts of said University, and that the defendant took his degree of Master of Arts in Trinity College aforesaid in 1827. That it was submitted whether the mere circumstance of a manuscript copy of said statutes being found in the Bodleian Library entitled defendant to copy and print and publish said statutes.

Mr. Cooper and *Mr. Harwood* now moved, upon the coming in of the answer and upon the statements therein contained, that the aforesaid injunction might be dissolved.

Sir Charles Wetherell and *Mr. K. S. Parker* for the plaintiffs stated, that although they should have been prepared to support the injunction had the facts been such, or substantially such, as were set forth in the bill and the affidavit in support of it, yet they felt it would be a fruitless occupation of the time of the Court to
[*274] attempt to *support the injunction upon the facts alleged by the answer, the accuracy of which in the main they were not instructed to call in question.

The MASTER OF THE ROLLS said that the counsel for the plaintiffs were well aware of the hesitation with which he had granted the injunction. He anticipated at the time that, in all probability, it would not be possible to sustain it. He felt, however, that it was a case for investigation. When application was made to him for such an injunction he was always disposed to accede to the application where little mischief could arise by the granting of the injunction *ex parte*, and on the other hand irreparable injury might ensue were the injunction refused. He believed that in the present instance it would be found that he had not departed from this rule.

Injunction dissolved.

1846. *Dec.* 14.

Lord COTTENHAM, L.C.

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WILLINK *v.* BENTINCK.

(1 Coop. temp. Cott. 288—290.)

A mortgagee of an estate in a colony, who has obtained a manager and decree for sale here, may be ordered to give the consent required by the colonial Court for the removal of a sequestration.

THE defendant was the owner of a plantation in Demerara. The plaintiff was the mortgagee of that plantation under instruments of a period earlier than that at which the defendant became entitled, and the defendant therefore was not personally liable for the money secured by the mortgage. There had been a reference to the Master

to appoint a manager in the colony, who was to remit the produce to a consignee in London. The defendant had been appointed such manager; subsequently the defendant ceased to be the manager, and a manager proposed by the plaintiff was named. A principal question in the cause was the right of the plaintiff to have a sale in this country. That question was decided in the plaintiff's favour. The decree declared that the plaintiff was entitled to have the plantation sold under the decree of the Court for payment of the principal and interest of his mortgage debt. Whilst the defendant was in the management of the plantation certain debts had been paid out of the produce to creditors of the plantation, not being debts for the management of it; and which debts the defendant alleged, and the plaintiff denied, to be properly payable out of the produce, as between the plaintiff and the defendant, and in priority to the plaintiff's demand as mortgagee. The decree therefore, after directing the Master to take an account of the produce of the plantation, and of the sale of the said produce, and how the proceeds of such sale had been applied, further directed, if the defendant claimed to be allowed any payment made by him, or his agents, otherwise than on account of the management of the plantation during his management, the Master was to be at liberty at the request of either party to state any circumstances relating thereto specially as he should think fit. Whilst the proceedings aforesaid were going on here, a creditor of the plantation, whose debt was of the description above mentioned, took proceedings in the courts of law of Demerara, and the *result was that the manager nominated [*289] by the plaintiff was turned out of possession, and the estate was sequestrated. According to the law prevailing in the colony the plantation must in consequence of the above proceeding have been sold there, notwithstanding satisfaction of the debt of the last-mentioned creditor, unless the plaintiff, an incumbrancer and creditor upon record, consented that the sale should not take place. The defendant being anxious that the estate should not be sold, was willing out of his own monies to satisfy the debt of the creditor proceeding in the colony, without prejudice to the question whether or not such debt was, as between him and the plaintiff, payable out of the produce of the plantation,—whether it was a debt having priority over the debt of a mortgagee. The defendant thereupon gave notice of motion before the Vice-Chancellor Wigram that the plaintiff and his agents might join with the defendant and his agents in the acts requisite for getting rid of the sequestration, the

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defendant paying the creditor's demand without prejudice. That motion being refused, the defendant now renewed it by way of appeal before the Lord Chancellor.

Mr. Cooper and *Mr. Lewis* for the appeal motion.

Mr. Wood and *Mr. John Bailey* against it.

The LORD CHANCELLOR said, that here was a plantation in one of our colonies. The Court had at the instance of the plaintiff taken possession of it by a manager. The Court had also at the instance of the plaintiff decreed, that the plaintiff was entitled to have the plantation sold under the decree of the Court for payment of the plaintiff's demand. Whether these proceedings were right, or wrong, it was not requisite now to consider. The defendant, or his agents, had for some time been the manager under the direction of the Court. In that character the defendant claimed to be allowed certain payments out of the produce of the estate as between him and the plaintiff, and in priority to the plaintiff's debt as mortgagee. The plaintiff on the
[*290] other hand, contended that a debt of this kind was *not to be paid out of the produce of the estate as against him in his character of a mortgagee. How this was, need not be now determined. It was plain from the decree that it was a question between the parties, and the Court so considered it. The plaintiff undoubtedly was not obliged to pay this money. He was only an incumbrancer. Nor was the defendant obliged to pay it. He was not personally liable, but the estate was his, and he was desirous that it should not be sold. That being so, and the plaintiff, supposing him to have the election, having come to this Court, and having asked its assistance, it was incumbent on the plaintiff to do whatever was necessary on his part, to give effect to that jurisdiction, which properly, or improperly, he had called into action. It was not for him to say that things might take their course in the colony. He could not be called upon to advance money, but if he was the only creditor in the colony whose debt made it imperative upon the Court there to proceed to a sale, he, having obtained a decree declaring that he was entitled to a sale here, ought to do whatever was requisite on his part to prevent the colonial Court from proceeding to a sale there. The application therefore must be acceded to. The plaintiff must do what was requisite for getting rid of the sequestration, and the payment to be made by the defendant for satisfaction of the colonial creditor must be without prejudice.

FOWLER *v.* JAMES.

1847.
Jan. 14.

(1 Coop. temp. Cott. 290—292.)

Lord COTTENHAM, L.C.

Suit for the execution of marriage articles containing a limitation in default of children to the persons who would be the next of kin of the wife if she was dead. There being no child of the marriage: Held, that the wife's next of kin were not necessary parties.

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By articles of agreement for a settlement executed previously to the marriage of the plaintiff and the defendant Fowler, it was agreed that the personal property, which the plaintiff, or the defendant Fowler in her right, should *become entitled to during [*291] the marriage, should be assigned to the defendant James and two other trustees to be chosen as therein mentioned upon trust, for the benefit of the plaintiff and the defendant Fowler during their lives; and after the death of the survivor upon trust as to the principal monies for the children of the marriage, and in default of children of the marriage upon further trust as to the said principal monies for the plaintiff absolutely if she should survive the defendant Fowler, but if the defendant Fowler should survive the plaintiff, then subject to his life interest, upon trust as she should by will appoint, and in default of appointment upon trust for such persons as at the death of the plaintiff would be entitled to her personal estate by virtue of the statutes made for the distribution of intestates' effects in case the plaintiff had died a widow and intestate. The plaintiff, or the defendant Fowler in her right, having become entitled to funds of a large amount, and no settlement ever having been executed in pursuance of the articles, and the defendant James being unwilling to act as a trustee, the present bill was filed for the purpose of having a reference to the Master to approve of a proper settlement, and to have trustees of it appointed, and to have the funds transferred. The funds were standing to the account of a lunatic, and the cause therefore came on to be heard as an original cause before the Lord Chancellor, when it was objected that the suit was defective for want of parties, and that those persons, who would now be the next of kin of the plaintiff in case she were dead ought to be parties. The objection was founded upon a case of *Wardle* v. *Hargreaves*, which came to be heard before Vice-Chancellor Knight Bruce, on the 10th of February, 1842. In that case stock was standing in the names of trustees, of whom all except one were dead. The trusts were for a party for life with remainder to those persons, who might be his next of kin at the time of his death. A suit was instituted for the appointment of new trustees, to which no

FOWLER v. JAMES. [*292]

persons except the tenant for life, and the surviving trustee were parties; and an objection was *taken on that ground. His Honour held the suit to be defective for want of parties. He said, he had always understood the rule to be that under those circumstances the persons, who would be the next of kin of the cestui que trust tenant for life if he were dead, ought to be parties, and he ordered the cause to stand over. It did not appear there was in that case, as in the present case, any power of appointment by will: but the absence of such power, it was submitted, could make no difference.

The LORD CHANCELLOR inquired of the counsel, who made the objection, whether there was any other authority in support of it besides that of *Wardle* v. *Hargreaves*, and being told that it was the only case of which they were aware, his Lordship—after saying he agreed that the circumstance, that here the wife had a power of appointment by will, did not afford a distinction, upon which any reliance could be placed—observed that the rule mentioned in the case cited must often produce inconvenience and expense. That such next of kin were a fluctuating class: that there might be continual alterations in the individuals composing it during the progress of an inquiry: that sometimes the individuals might be changed altogether, and sometimes their numbers augmented. Would it not be necessary that supplemental bills should be filed from time to time? He did not recollect to have met with the rule. Were there not cases in which it had been held sufficient to bring before the Court a person being only a tenant for life? He should decline to allow the objection in the present instance.

Mr. Cooper, *Mr. James Parker*, *Mr. Stinton*, and *Mr. Rogers*, were the counsel in the cause.

1820. *January.*

LEACH, V.-C. [329]

FISHER *v.* HUGHES.

(1 Coop. temp. Cott. 329—330.)

Quia timet bill for the protection of specific chattels.

THIS was a motion for the protection of some specific chattels, in which the plaintiff claimed to be interested under a will. The principal defendant was tenant for life.

SIR JOHN LEACH said:

This is a *quia timet* bill, and the jurisdiction of this Court

exercised upon it is only an *expansion of that common-law jurisdiction, which in ancient times was exercised upon preventive writs, then called *brevia anticipantia*. As at law two things, title and danger to property, were requisite for the issuing of those writs, so here two things are requisite for the support of a *quia timet* bill. First, there must be a title in possession, or expectancy, in the plaintiff. It signifies not, whether the latter be vested or contingent. It signifies not whether the title be legal or equitable. The Court, indeed, will not declare the plaintiff's title, but it will look at the will or other instrument under which he claims. The title in the plaintiff is not alone sufficient. There must, secondly, be danger to the property. If there be such danger the Court will interfere, and will take it into its own possession, or will appoint a receiver, or will grant an injunction, according to the nature of the case, and so protect and preserve the property for such person as may become the owner of it, although possibly the plaintiff may not be that person. Events may displace his title. Now, here are both these requisites: the specific chattels are in the uncontrolled possession of the defendant, and the affidavits show a manifest case of danger. The plaintiff, too, may become entitled in more than one contingency. The defendant must give security, or the motion must be granted.

Mr. Heald and *Mr. Cooper* for the motion.

Mr. Agar against it.

BOWMAN *v.* BELL.

1847. *Feb.*

SHADWELL, V.-C. [331]

(1 Coop. temp. Cott. 331—332.)

Funds of the wife not to be transferred to the husband upon affidavit only that they are not comprised in the marriage settlement—but the settlement itself must be produced and inspected.

THIS was a petition, that certain funds, in trust in the cause to the account of a married woman, might be transferred to her husband upon an affidavit of the husband and wife stating that a settlement had been executed, but that it did not comprise these funds.

Mr. Cooper for the petition called the attention of the Court to the rule laid down by the MASTER OF THE ROLLS, in *Rose* v. *Rolls* (1).

(1) 49 R. R. 362 (1 Beav. 270).

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The VICE-CHANCELLOR OF ENGLAND said he was glad that his attention had been called to that case. He should follow it for two reasons. In the first place he fully concurred with the opinion expressed by the MASTER OF THE ROLLS, that if any settlement existed, the parties were not competent judges of its effect. He thought it very probable that instances had occurred, not only before the MASTER OF THE ROLLS, but elsewhere, where parties having represented by affidavit that a settlement did not affect the property in question, yet upon inspection of the settlement it had turned out to be quite the reverse. That in his opinion it could only be satisfactorily ascertained that the property, the subject of the petition, was not embraced by the settlement, from an examination of the instrument itself. It was sometimes a nice question. In the next place it was of great importance, that there
[*332] should be uniformity of *practice in all the Courts, and that a particular course having been pursued by a solicitor in one Court, he should not have to consider whether a different course must not be pursued by him in another Court. He should not, therefore, make the order upon the affidavit only, but the petition must stand over, and the settlement must be produced and inspected.

1837.
June.

Lord COTTENHAM, L.C.

[350]

BENSON *v.* GLASTONBURY CANAL COMPANY.

(1 Coop. temp. Cott. 350—351.)

According to the bill a parol agreement was for the sale and the plaintiff insisted that possession had been given of five acres. According to the answer, of three acres only. Motion that the purchase money for the five acres, or otherwise for the three acres, might be brought into Court, refused.

LORD COTTENHAM said, here was a bill seeking the specific performance of a parol agreement by the defendants to purchase from the plaintiff five acres of land at 80*l.* an acre; the plaintiff has given possession to the defendants, but there did not appear to have been any understanding respecting the time when the purchase money should be paid. That the answer admitted an agreement to purchase land from the plaintiff at 80*l.* an acre, but denied any agreement to purchase more than three acres of land: and the answer alleged that the land, of which possession had been given, did not exceed three acres in quantity. That the plaintiff now moved upon this answer that the purchase money for five acres might be brought into Court, and if the Court should not accede to that application,

then, in the alternative, that the purchase money for three acres might be brought into Court; but the plaintiff had not—assuming that he was at liberty to do so—even amended his bill and adapted it to the case made by the answer.* He still insisted that the agreement was to purchase five acres and not three acres, and that possession had been given of five acres. Now if the cause should be brought to a hearing, and the plaintiff should fail to prove that the agreement was as laid by the bill, must not the consequence be that the bill would be dismissed? Under these circumstances, the answer not admitting the agreement insisted upon by the bill, and the bill containing no alternative corresponding with the lesser object of the notice of motion—as to the sufficiency of such an alternative he would say nothing—he was of opinion that the motion must be refused.

FIFE *v.* CLAYTON (1).

1807. *April.*

Lord ELDON, L.C

[351]

(1 Coop. temp. Cott. 351—353.)

A contract for the sale of land made after the passing of a local Inclosure Act does not include any allotment which may be made under the Act subsequently to the contract in respect of the land comprised in the sale.

THE defendant put up to sale by auction a freehold public-house and other premises in the parish of Enfield, on the 20th of July, 1801. A few days before the sale, on the 2nd of July, 1801, an Act of Parliament was passed for enclosing the common fields and waste lands in the parish. No allotment was made until some time after the sale. The printed particulars of sale merely described the house and premises; they mentioned no right of common, and in no way alluded to the expected allotment. The plaintiff, who purchased the premises by an agent, alleged that he had authorized his agent to bid a much larger sum for the premises on the understanding that a parcel of the waste lands would be allotted to the owner of the premises put up to sale, and that the allotment would belong to the purchaser; and he alleged declarations of the auctioneer at the sale to show that there was this understanding. The bill prayed a specific performance of the agreement for sale

(1) This case has already been shortly reported, 9 R. R. 220 (13 Ves. 546). The report here given, which is much fuller than the report in Vesey, is taken from a note in 1 C. P. Cooper (temp. Cott.) commencing at p. 351, from a manuscript in the reporter's possession. The point stated in the above head-note does not appear from the report of the case in Vesey.—O. A. S.

FIFE v. CLAYTON.

and a conveyance of the allotment, the plaintiff offering to perform the agreement on his part. The answer submitted that as the Inclosure Act had passed at the time of the sale, the intended allotment had become separate property, and could not be taken [*352] as comprised under the *description of the particulars of sale. The answer denied the understanding alleged by the bill and also the declarations of the auctioneer. It asserted, on the contrary, that the defendant had told the auctioneer that he meant to reserve the allotment, and that the auctioneer had declared at the time of the sale that the expected allotment was not to be sold with the premises. Both the plaintiff and the defendant went into evidence, from which it appeared that the auctioneer had, as the defendant asserted, expressly stated at the time of the sale that the purchaser would not be entitled to any allotment to be made.

For the plaintiff it was said that unless the Court should think that the allotment could be considered as comprised in the description of the house and premises in the printed particulars, the bill must be dismissed—the statement contained in the bill as to the declaration of the auctioneer having been disproved by the parol evidence on the part of the defendant.

For the defendant it was said that there was no pretence for the suggestion that the allotment could be considered as comprised in the description of the house and premises in the printed particulars, nothing being said as to any right of common: and that the bill ought not to be dismissed, but the defendant was entitled to a specific performance although he had not filed any cross bill for that purpose.

Lord ELDON said, that the Act of Parliament for enclosing Enfield waste and common lands having passed, although a few days only, previously to the sale, and the printed particulars of sale being wholly silent as to any right of common, or as to any allotment, which the owner of the premises put up to sale would become entitled to by virtue of the Act, it was impossible to hold that the purchaser had bought the allotment, although made subsequently to the sale. That parol evidence, such as that into which the plaintiff had gone, was receivable only where the purchaser was a defendant, and the vendor as plaintiff sought to enforce the agreement against him. Where the purchaser was plaintiff, the question was only one of construction. If the

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auctioneer represented that the purchaser would be entitled not only to the premises put up to sale as described in the printed particulars, but also to an allotment to be made in respect thereof, the purchaser being defendant, and the vendor plaintiff, seeking to compel the purchaser to take a conveyance without the allotment, the purchaser might go into parol evidence of what the auctioneer had said in order to resist the vendor's demand. In the present case the purchaser by his bill offered *to perform the agreement on his part, which must be taken to mean what the Court, upon hearing all the circumstances, should be of opinion was the agreement. The evidence on both sides had been read—whether regularly or irregularly was not now very material. There could be no longer any question as to the incorrectness of the statements contained in the bill. Was this a case in which it was necessary that the defendant should have filed a cross bill? He thought not. The practice formerly was different. The defendant must have a decree for specific performance, and the plaintiff must pay the costs of the suit.

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HINDLE *v.* DAKINS.

1838. *November.*

(1 Coop. temp. Cott. 378.)

Lord COTTENHAM, L.C.

Where there is unexpected delay in making out the title on a sale by the Court, and the purchaser is desirous of relieving himself from the payment of interest, he should apply for leave to pay the purchase money into Court.

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LORD COTTENHAM said that where by the conditions of sale approved of by the Master, the sale was to be completed, the purchase money was to be paid, and possession was to be given to the purchaser at stipulated times, and the purchaser was to pay interest on his purchase money from the time stipulated for the payment; and there was any unexpected delay in making out the title; and the purchaser, having his money ready and unproductive, was desirous of relieving himself from the payment of interest, his proper course was to make a special application for liberty to pay the purchase money into Court, notwithstanding the investigation of the title was not complete: and the Court would direct the purchase money to be laid out in Consols, and the dividends also when they should amount to a competent sum: without prejudice, however, to any question as to the rents of the estate and to the interest on the purchase money. The Court would, however,

HINDLE v. DAKINS.

rarely sanction any departure from the rule that the payment of the purchase money into Court is an acceptance of the title.

Mr. Wakefield, *Mr. Cooper*, *Mr. Girdlestone*, and *Mr. Chandless*, were the counsel engaged.

See also *Hindle* v. *Dakins* (1).

1823. *May.*

BEVAN *v.* BEVAN.

(1 Coop. temp. Cott. 381.)

Rolls Court. GRAHAM, B. [381]

Delay in the preparation of the draft conveyance is no sufficient ground for coming to the Court to have part of the purchase-money applied to pay off incumbrances.

THERE having been a sale of an estate under a decree in the cause, and the purchaser having paid his purchase money into Court, the solicitor of the purchaser had greatly delayed the preparation of the draft conveyance; and it being urgent that certain charges to which the estate was liable should be forthwith satisfied, a petition was presented by the plaintiffs in the cause, that a portion of the purchase money might be applied for that purpose. This petition was opposed on the part of the purchaser, upon the ground that he had not yet got his conveyance. Mr. Baron GRAHAM sitting (together with Masters Harvey and Cox) for Sir Thomas Plumer, who was ill, said, that the petitioners, the plaintiffs, had mistaken their course. That they ought to have taken the usual proceedings to compel the purchaser to bring the draft conveyance into the Master's office, and to have the draft conveyance settled and engrossed; and they ought to have procured the Master's report of its allowance. They should then have got the conveyance executed by the proper parties, and should have tendered it to the purchaser for his acceptance. That was the course pointed out by the practice of the Court for avoiding the inconvenience to which the petitioners, the plaintiffs, were now exposed. The Court, notwithstanding the dilatory conduct of the purchaser's solicitor, would not, without the consent of the purchaser, order any part of the purchase money to be applied for the payment of the incumbrances in question, until the purchaser had got his conveyance. The delay of the purchaser in the preparation of the draft conveyance, was no sufficient ground for coming to the Court to have part of the purchase money applied

(1) 46 R. R. 141 (1 C. P. Coop. 381).

to pay off incumbrances. If the purchaser had not got his conveyance, it must at all events be first executed and tendered for the purchaser's acceptance.

BEVAN v. BEVAN.

NEAP *v.* ABBOTT (1).

1838. *June.*

(1 Coop. temp. Cott. 382.)

Lord COTTENHAM, L.C. [382]

In a suit for specific performance, the nature of a case being such as, even in the absence of parol evidence, to impress the mind of the Court with the belief that there has been surprise or mistake, the plaintiff should be left to his legal remedy.

LORD COTTENHAM said, that where a bill was filed for the specific performance of an agreement and a decree was resisted on the ground of mistake or surprise, the nature of the case might be such, as even in the absence of parol evidence, to impress the mind of the Court with the belief that there had been the surprise or mistake alleged. And the mind of the Court being impressed with this belief, and a specific performance not being a matter of right in the plaintiff, but a matter of discretion in the Court—by discretion he did not mean an arbitrary discretion, but a discretion, governed by rules and principles deduced from preceding decisions—the Court was fully justified in declining to make any decree for specific performance. In such a case the decree, the most in accordance with the principles and rules upon which the Court had acted for a great many years, would be to leave the plaintiff to his legal remedy for the non-performance and dismiss the bill, but, unless there was anything to show that the bill ought never to have been filed, without costs.

Mr. Wakefield, *Mr. Wigram*, *Mr. Cooper*, *Mr. Girdlestone*, and *Mr. Bethell*, were the counsel in the case.

See *Neep* (or *Neap*) v. *Abbott* (2).

RE WEBB.

1846. *Dec.* 4.

(2 Coop. temp. Cott. 102—105.)

Lord COTTENHAM, L.C. [102]

A lunatic being illegitimate, and never having been married, but having a natural daughter, residuary legatee under a will made before the lunacy. An order was made that she should have notice of all proceedings, and be at liberty to attend the same.

The natural daughter having constantly resided with the lunatic, order

(1) *Tamplin* v. *James* (1879) 15 Ch. D. 215.

(2) 46 R. R. 139 (C. P. Coop. 333).

Re WEBB.

that she should be at liberty to carry in a proposal for committee of the person.

The lunatic being tenant for life of large real estates, and the commission having been issued at the instance of the remainderman, order that his natural daughter should be at liberty to carry in a proposal for committee of the estate.

BY an order made in the matter of this lunacy in July, 1846, it was ordered that if the inquisition should be returned finding the unsoundness of mind, the Masters in lunacy should nevertheless not proceed to the approval of committees of the person or estate of the lunatic. The lunatic and a deceased brother were illegiti-
[*103] mate children. *The lunatic had never been married, but had a natural daughter whom he had recognised, brought up, and educated, and by a will, executed previously to the lunacy, made his sole residuary legatee. This natural daughter had always resided with the lunatic. The lunatic was entitled for life to large real estates. The commission had been issued at the instance of the son of the lunatic's deceased brother, who was entitled in remainder to the real estates of which the lunatic was tenant for life. The inquisition having been returned finding the unsoundness of mind, a petition was presented by the remainderman praying a reference notwithstanding the order of July, 1846, to inquire in the usual way who were the most fit persons to be appointed committees of the person and estate of the lunatic; and a cross petition was at the same time presented by the natural daughter of the lunatic, and residuary legatee under his aforesaid will, praying that she might have notice of, and might be allowed to attend, all proceedings in the matter, and that she might be at liberty to carry in proposals for committees of the person and estate of the lunatic.

THE LORD CHANCELLOR said:

With regard to the first part of the application of the natural daughter, that where there is a legal relationship the rule is that the next of kin have notice of the proceedings, and have liberty to attend the proceedings. That the reason of the rule is that they being the persons, who would be entitled to distributive shares of the personal estate of the lunatic if he were dead, intestate, it is presumed that they will aid the Court by watching generally the interests of the lunatic, and particularly by checking the accounts. That the reason of the rule manifestly applied to such a case as the present. That the lunatic was illegitimate, and had never been married. In law,

therefore, the lunatic had no next of kin. But he had a natural daughter, residuary legatee under a will made before the lunacy. That it might be presumed that under *those circumstances such [*104] natural daughter would be as much disposed to assist the Court as if she were the sole next of kin. He should therefore order that the natural daughter should have notice of all proceedings, and should be at liberty to attend the same. Then with regard to the second part of the application of the natural daughter—there could be no hesitation as to the proposal for committee of the person. That it appeared that the natural daughter had constantly resided with the lunatic her father. No one, consequently, could be better acquainted with such wishes of the lunatic as might properly be attended to, and with the arrangements most likely to contribute to his comfort. She must have liberty to carry in a proposal for a committee of the person. The same liberty was, however, asked as to the committeeship of the real estate. Now the lunatic was tenant for life of large real estates, and the commission had been issued at the instance of the remainderman. That questions were continually arising between persons entitled for life to landed property, and persons entitled in remainder, with regard to management and expenditure. That those questions were sometimes questions of nicety and difficulty, and of considerable importance to the interests of the tenant for life. That in the present case there might possibly be questions of that description, and then it would be desirable that there should be a committee of the estate respecting whose impartiality there could be no suspicion. That it might well be thought this impartiality would not be easily obtained, if the remainderman alone had the power of proposing the committee of the estate. That a similar power, in his opinion, ought to be given to someone representing the interests of the tenant for life, as distinguished from those of the remainderman. That, there being no next of kin, he should direct that the natural daughter, she taking the residue of the personal estate under the lunatic's will, should be at *liberty to carry in a proposal for a committee of [*105] the estate.

Mr. Romilly, *Mr. James Parker*, *Mr. Busk*, and *Mr. Walford* were the counsel.

1808.
July.

Lord ELDON, L.C.
[107]

RE CRANMER.

(2 Coop. temp. Cott. 107.)

LORD ELDON:

The heir-at-law is often disposed to apply the personal estate in the improvement of the real estate. But the next of kin are interested in taking care that what will belong to them shall not be expended in increasing the value of that which will never belong to them. The heir-at-law being, as generally happens, the committee of the estate, a better check upon his accounts can, in my opinion, hardly be devised, than to subject them to the inspection and objection of the next of kin.

[From a MS. in the author's possession.]

1829.
August.

Lord LYNDHURST, L.C.
[107]

RE HOWELL.

(2 Coop. temp. Cott. 107.)

In general an order is not requisite that any of the next of kin may be at liberty to carry in proposals for committees of the person and estate of the lunatic, and they shall have notice of any proposal for committees of the person and estate, which the party prosecuting the commission shall carry in.

Where, from any peculiar circumstances, such an order is requisite, the case probably will very rarely occur in which the Lord Chancellor will decline to make it.

LORD LYNDHURST:

In general an order is not requisite that any of the next of kin may be at liberty to carry in proposals for committees of the person and estate of the lunatic, and that they shall have notice of any proposal for committees of the person and estate, which the party prosecuting the commission shall carry in. Where from any peculiar circumstances such an order is requisite, the case probably will very rarely occur in which the Lord Chancellor will decline to make it. The policy here has long been in favour of making such an order. If the persons connected with the lunatic by blood, and interested in his estate, shall not come forward, (and they not unfrequently will not care to come forward when obstacles are thrown in their way,) the consequences will be extremely mischievous. It is, in general, only by means of the information, which such persons possess, that the Lord Chancellor can ascertain whether any proposal, upon which he is called to exercise a judgment, ought to be adopted as the most conducive to the ease and welfare of the lunatic, and to the security of his property.

RE EARLY.

1837.
July.

Lord COTTENHAM, L.C.

(2 Coop. temp. Cott. 107—108.)

LORD COTTENHAM:

[107]

Where the lunatic has no next of kin, the *Attorney-General* on behalf of the Crown must have notice of *the proceedings subsequent to the return of the inquisition. [*108]

BREYNTON *v.* LONDON AND NORTH WESTERN RAILWAY CO.

1846.
Dec. 19.

Lord COTTENHAM, L.C.

(2 Coop. temp. Cott. 108—110; S. C. 10 Beav. 238; 11 Jur. 28.)

[108]

An agreement recited that the defendants were desirous of purchasing land from the plaintiff for the purpose of constructing a railway, according to a certain plan and section thereof deposited with the parish clerk, and contained no further notice of the plan and section: Held, that the recital alone did not bind the defendants to construct the railway according to the plan and section.

BY an agreement dated July, 1846, and made between the plaintiff of the one part and Harvey Wyatt as the agent of the defendants of the other part, after reciting that the defendants were desirous of purchasing certain land from the plaintiff in the parish of Armitage, for the purpose of constructing a railway from Stafford to Rugby, "according to a certain plan and section thereof, deposited with the parish clerk of the said parish," which said land had been staked out by the agents of the said defendants: it was witnessed that the said plaintiff had agreed to sell, and the said Harvey Wyatt as the agent of the defendants had agreed to purchase the said land, &c. Except in the recital the agreement contained no notice of the plan and section of *the railway deposited with the parish clerk of the parish of Armitage. The defendants in their works having deviated from the plan and section, the plaintiff filed his bill praying an injunction to restrain them from doing any acts inconsistent with such plan and section. Upon an appeal motion there was an objection (not taken in the Court below) that the plan and section, although mentioned in the recital of agreement, did not for that reason form any part of the agreement, and that the plaintiff had no right to complain that the defendants had in their works deviated from the plan and section, and consequently a bill for an injunction to restrain the defendants from doing any acts inconsistent with the plan and section could not be sustained.

[*109]

The LORD CHANCELLOR said, that it frequently happened that an

BRUNTON v. LONDON AND NORTH-WESTERN RAILWAY CO.

agreement referred to a plan which might, or might not, embrace more than that which was the subject of the agreement. That, whatever was the nature of the plan, it could nevertheless only be looked at under the agreement. That it could only be looked at so far as it was necessary to construe the agreement, and therefore to that extent incorporated in the agreement. That if, for the purposes of the agreement, a reference to the plan was essential, it must so far be considered as part of the agreement. That the mere exhibition of a plan—the deposit of it with parties not included in the agreement—the reference to it for matters not comprehended by the agreement—could raise no equities between the parties to the agreement—could not justify the interference of the Court to prevent one of such parties doing an act inconsistent with the representation contained in the plan. That this had been recently decided by the House of Lords (1). That the agreement in the present case, reciting that the defendants were desirous of purchasing land from the plaintiff for the purpose of constructing a
[*110] railway, according to a certain plan and section *thereof, deposited with the parish clerk, and containing no further notice of the plan and section, he was of opinion that the defendants were not bound in consequence of the recital aforesaid—without more—to construct the railway according to such plan and section.

Mr. Cooper, *Mr. Bethell*, *Mr. Bazalgette*, *Mr. J. A. Cooke*, and *Mr. Follett* were the counsel engaged.

1845. *March.*

SAMUEL *v.* SAMUEL.

(2 Coop. temp. Cott. 119—121.)

SHADWELL, V.-C.
[119]

Construction of a direction by a testator, that all moneys inherited by his daughters under his will, should be placed in the hands of trustees, appointed by their guardians, to be settled on them for the sole use of themselves and their lawful issue.

[THE will in this case, which was that of a testator named Alfred Phillips, was in the following terms:]

[120] "I hereby constitute, nominate, and appoint Mr. Philip Samuel, and Mr. Denis Moses Samuel, to be my lawful executors for all purposes, and guardians to my children, until they shall each severally attain the age of twenty-five years, which age shall constitute their majority; and I hereby declare it to be my wish, and I solicit my now partner, Mr. Denis Moses Samuel aforesaid, to

(1) *The North British Railway Company* v. *Tod*, 69 R. R. 180 (12 Cl. & Fin. 722).

continue and carry on our business, both in London and in the Brazils, in the manner which to him may seem best; and I authorise my executors to allow all, or any part of my property, to remain engaged in such business. I hereby declare that I desire all property of whatever kind I may die possessed of, or which may accrue to my estate, to be equally divided between my four children, share and share alike in the manner hereinafter mentioned; that is to say, that whenever my partner, Mr. D. M. Samuel, shall think fit to pay any money into the hands of my executors, such money shall be invested in any manner, that they shall think fit, for the benefit of my children. And I desire that my daughters do not marry during their minority without the consent of their guardians had in writing. And I authorise them to give to such of my daughters, on the day of her marriage, such sum of money as dowry as they shall think fit. And in case that either of my daughters shall marry without the consent of her guardians before she shall have attained the age of twenty-five years, she shall only be entitled to one half or moiety of her quarter share of my estate. And I hereby direct that all moneys inherited by my daughters under this will shall be placed in the hands of trustees, appointed by their guardians, to be settled on them for the sole use of themselves and their lawful issue."

The suit was for the execution of the trusts of the will; and there were large funds in Court, the proceeds of the testator's estate. Margaret Phillips, who was the eldest of the four children of the testator, having attained the age of twenty-one years, presented a *petition, praying that it might be declared that she was absolutely [*121] entitled to one-fourth part of the funds in Court. Upon that petition an order was made for payment of the dividends only upon such one-fourth part to her, until the further order of the Court, without prejudice to the question raised by the petition. Margaret Phillips having now attained the age of twenty-five, and not having married, presented another petition, again praying that it might be declared that she was absolutely entitled to one-fourth part of the said funds in Court, and that the same might be transferred to her, or if not, that it might be referred to the Master to approve of a proper settlement. This petition was now argued before the Vice-Chancellor.

THE VICE-CHANCELLOR OF ENGLAND: [119]

The will directs that all moneys inherited by the testator's

SAMUEL v. SAMUEL. [*120]

daughters under it,' shall be placed in the hands of trustees, appointed by their guardians, to be settled on them for the sole use of themselves *and their lawful issue. The daughters are absolutely entitled.

Mr. Swanston, *Mr. Cooper*, *Mr. Simpson*, *Mr. Tripp*, and *Mr. Gordon* were the counsel.

1846. *July* 22.

Lord COTTENHAM, L.C. [145]

IN THE MATTER OF JOHN WEBB, ESQUIRE, A SUPPOSED LUNATIC.

(2 Coop. temp. Cott. 145—155.)

The supposed lunatic, being in the neighbourhood of Paris, and having no place of residence in this country, commission of lunacy ordered to be executed in Middlesex.

Commission ordered to issue for the examination of witnesses residing in or near Paris.

The carriage of the commission should be given to that party, by whom it is most likely that the whole truth will be brought out.

In questions as to the issuing and carriage of commissions of lunacy, relations are, unless under peculiar circumstances, always preferred to creditors.

There has been, in general, a reluctance to make orders, giving parties liberty to attend the execution of a commission of lunacy by their counsel and solicitors.

The proper order, in cases where it may be fit to give a party liberty to carry in proposals for committees of the person and estate, is to direct that the Master in lunacy—in case the inquisition should be returned, finding the lunacy—shall not proceed to the approval of committees of the person and estate until further order.

A practice, in the appointment of committees, to give a preference to the proposal of the party who, upon a contest, has succeeded in obtaining the carriage of a commission, would be a most improper practice.

ON the 25th of April, 1846, William Frederick Webb, an infant, by Mary Webb his mother and next friend, presented a petition in this matter, stating that the supposed lunatic and his brother, Frederick Webb, were the natural sons of Sir John Webb, Baronet, deceased; and that the supposed lunatic was entitled to real estates in Yorkshire and Lincolnshire for his life, with remainder to his first and other sons successively in tail male with remainder to the said Frederick Webb for his life, with remainder to the said Frederick Webb's first and other sons successively in tail male; and that the said estates produced a gross rental of 12,000*l.* per annum. That the said supposed lunatic was in the 60th year of his age, and was a bachelor, and had for many months past been a person of unsound mind, and not competent to manage his affairs. That for many years before, and up to the year 1840,

the said supposed lunatic resided in lodgings in the Quadrant, in the parish of St. James's, in the city of Westminster, and had not for many years past, if ever, had any other place of abode in this country. That up to the year 1840 he had resided in England, but that in that year he went to France, and had ever since resided abroad; and that, being in a state of complete mental aberration, he had, on the 12th November, 1845, been placed in an establishment, under the direction of a doctor of medicine, at Montmartre, Paris. That on the 4th of February, 1846, the said Frederick Webb died leaving the petitioner, William *Frederick Webb, his [*146] eldest son, an infant, of the age of seventeen years. That on the 19th of April, 1846, the said John Webb was removed from the said establishment at Montmartre, and placed in the establishment of Doctors Falret and Voisin, at Vanves, near Paris, where he then was. The said petition prayed that a commission, in the nature of a writ *de lunatico inquirendo*, might be issued to inquire of the lunacy of the said John Webb and might be directed to such persons, and executed at such place, as to the Lord Chancellor should seem fit.

Caveats had been entered against a commission of lunacy issuing in this matter, on behalf both of John Webb, the supposed lunatic, and the West of England Life and Fire Insurance Office, creditors of the said John Webb. Lord LYNDHURST therefore ordered, that all parties should attend him, on the matter of the petition, the next day of petitions, after the 28th April, 1846, and that notice thereof should be forthwith given to the solicitors who had entered the *caveat* on behalf of the said John Webb, and also to the solicitors who had entered the *caveat* on behalf of the aforesaid Company.

On the 5th of May, 1846, Charles Lewis, the secretary of the West of England Life and Fire Insurance Company, presented a petition in this matter on behalf of the said Company, stating certain indentures of April, 1841, by which the said supposed lunatic demised the estates aforesaid to trustees for the term of 150 years, if he should so long live, to secure to the said Company a sum of 58,000*l.*, advanced to the said John Webb by way of mortgage; and that as a further security for the said sum and interest, various policies of insurance, which had been effected by the said John Webb and other persons on the life of the said John Webb, were, by different indentures, assigned to trustees on behalf of the said Company; and that the said Company had, in exercise of powers contained in their mortgage deed, also effected

Re WEBB. various policies of insurance, which had been effected by the said John Webb and other persons on the life of the said John Webb, were, by different indentures, assigned to trustees on behalf of the said Company; and that the said Company had, in exercise of powers contained in their mortgage deed, also effected various policies of insurance on the life of the said John Webb; and that
[*147] the annual premiums *payable in respect of all the said policies of insurance, were, according to the terms of the mortgage deed, charged upon the said estates; and that the annual premiums, payable on the said policies of insurance, amounted to the sum of 2,330*l.*, and the yearly interest on the said sum of 58,000*l.* to the sum of 2,900*l.* And the said petition of the said Charles Lewis further stated, that the petition of the said W. F. Webb had been presented, and that an affidavit, tending to show the unsoundness of mind of the said John Webb, had been filed in support of the said petition. And the petition of the said Charles Lewis prayed, that if a commission, in the nature of a writ *de lunatico inquirendo*, should be issued to inquire of the lunacy of the said John Webb, the said petitioner, Charles Lewis, on behalf of the said Company, or otherwise that such other order should be made as to the Lord Chancellor should seem meet, for the purpose of providing for the safety of the person and estate of the said supposed lunatic, and at the same time maintaining and protecting the interests of the said West of England Life and Fire Insurance Company.

These two petitions, of William Frederick Webb and the West of England Life and Fire Insurance Company, came on to be heard before Lord Lyndhurst on the 29th of May, 1846, when an order for a commission of lunacy was strongly opposed on behalf of the said John Webb, the supposed lunatic; and Clara Julia Webb, a natural daughter of the supposed lunatic, made an affidavit, stating that it was true that in the month of November, 1845, the said John Webb being then in Paris, fell ill, and that his mind became so much affected, that his medical attendant, with the sanction of his banker, judged it expedient to have him removed from his then residence to a *maison de santé*, at Montmartre, since which time he had been removed to the *maison de santé*, at Vanves, but that she deprecated a commission of lunacy as premature and unnecessary, until a greater lapse of time should have more fully established
[*148] *the incurable nature of the said John Webb's malady; and the said Clara Julia Webb, by her affidavit, further stated, that there were improved symptoms in the case of the said John Webb, which

had raised hopes in her that his mental malady was not incurable, and that her belief was, that if he was allowed to remain tranquil, in his then state of retirement, and guarded by the cares which then surrounded him, there would be a most material improvement in, if not a complete cure of, his mental disease, and that it was her belief that the knowledge of a commission of lunacy having been issued against him, would have a most prejudicial effect upon his mind. Re WEBB.

Lord LYNDHURST ordered that the further hearing of the said petitions should stand over until the day preceding the last seal before the long vacation.

On the 17th of July, 1846, the said Clara Julia Webb, an infant, by Sir Samuel Scott, Bart., her next friend, also presented a petition in this matter stating, that she was of the age of nineteen years, and that from her earliest recollection, she had been domiciled and lived with the said John Webb, and that she had been always called, by the said John Webb, his daughter, and treated by him and introduced to his friends as such, and had every reason to believe, and did believe, that she was the daughter of the said John Webb, having ever received from him the care and attention of a kind and fond father, and that she had been brought up and educated by the said John Webb, and *had rarely been separated [*149] from him, and that when she had been so separated from him, the said John Webb, the intervals of such separation had never been of long duration, and had been occasioned solely by the necessity or propriety of placing her at school; and the petition of the said Clara Julia Webb prayed, that if a commission, in the nature of a writ *de lunatico inquirendo*, should be issued to inquire of the lunacy of the said John Webb, the carriage of such commission might be committed to the charge of the said Clara Julia Webb, or to the said Sir Samuel Scott on her behalf.

An affidavit of *Mr. Walford* stated that in the year 1840, he had, as the solicitor of the said John Webb, prepared his will, and that the same was then in his (*Mr. Walford's*) custody, and that under such will the said Clara Julia Webb was residuary legatee.

The three petitions were now heard, and the propriety of issuing a commission forthwith was no longer questioned, and the only point argued was as to the carriage of it—whether the said commission for inquiring into the lunacy of the said John Webb should issue at the instance of William Frederick Webb, the remainderman; or of the West of England Life and Fire Insurance Company,

Re WEBB. incumbrancers upon the lunatic's life estate; or of Clara Julia Webb, his natural daughter.

Mr. Romilly and *Mr. Busk*, in support of the petition of W. F. Webb.

Mr. Bacon and *Mr. Prior*, in support of the petition of the West of England Life and Fire Insurance Company, asked, if the Company had not the carriage of the commission, then that they might be at liberty to attend the execution of commission.

Mr. James Parker and *Mr. Walford*, in support of the petition of Clara Julia Webb, also asked, if she had not the carriage of the commission, that she might nevertheless be at liberty to attend the execution of the commission. They, moreover, referring to the
[*150] 10th General *Order in Lunacy of October, 1842, asked, in case the unsoundness of mind was found, that Clara Julia Webb might be at liberty to lay proposals before the Master for the appointment of committees of the person and of the estate. They suggested that it was the practice of the Masters in lunacy in the appointment of committees, to give a preference to the proposal of the party who, after a contest, had succeeded in getting the carriage of the commission, unless the particular case afforded some reason why the practice should not be followed.

The LORD CHANCELLOR said that the supposed lunatic being in the neighbourhood of Paris, and having no place of residence in this country, he should order the commission of lunacy to be
[*151] executed in Middlesex. *That under the circumstances a commission must issue for the examination of witnesses in or near Paris. That the inquiry could scarcely be satisfactory without the testimony of persons resident there, mostly foreigners. That the only matter, which had been discussed before him, was—who should have the carriage of the commission. That, in general, the preference was given to the nearest relation, but then such preference was only given *cæteris paribus*. There must be no reason to suspect that the nearest relation applying for the commission, was less disposed than some other applicant to promote the inquiry. That here the alleged lunatic was illegitimate, and had never been married; that in law, therefore, he had no relations; he had however, natural relations. His nearest natural relation was Clara Julia Webb, who, as it appeared by the affidavits, was his daughter, and who had been brought up and acknowledged by him as such,

and who was moreover sole residuary legatee under a will executed by him several years ago. That the next natural relation was the supposed lunatic's nephew, W. F. Webb, the son of his deceased brother Frederick Webb, and who was entitled in remainder to the large real estates of which the supposed lunatic was the tenant for life. That three petitions had been presented in the matter. First, the petition of W. F. Webb, presented the 25th April last, stating that his uncle the said John Webb, had been for some months of unsound mind and not competent to manage his affairs, and praying that a commission might issue. Next the *petition of [*152] the West of England Life and Fire Insurance Office, presented the 5th of May last, stating that affidavits had been filed in support of W. F. Webb's petition, tending to show the unsoundness of mind of the said John Webb, and praying that if a commission was issued the said Company might have the carriage of it. Lastly, the petition of John Webb's natural daughter, the said Clara Julia Webb, presented the 17th of July, stating no opinion as to the condition of the said John Webb's mind, but praying if any commission was issued, that she might have the carriage of it. That this young lady had, however, made an affidavit in opposition to the petition of W. F. Webb, deprecating any commission as premature and unnecessary, and holding out hopes of a complete cure, or at least most material improvement. That, as he understood, it was in great measure in consequence of this affidavit that the hearing of the two petitions had been adjourned by Lord LYNDHURST. That the opinion expressed in this affidavit, had not been borne out by the event. That the suggestion that the malady was of a temporary nature, and that a recovery (at least in any short space of time) was probable, had turned out to be erroneous. That it was not now denied that it was expedient, to issue a commission to inquire into the alleged unsoundness of mind, at the time when W. F. Webb's petition was presented. That it would have been as well had the adjournment not taken place. That it appeared to him that the said Clara Julia Webb was indisposed (possibly from no improper motives) to admit that her father was a fit subject for a commission. Under these circumstances apply the rule governing cases of this kind to the claims of the daughter and of the nephew. That the rule was that the carriage of the commission should be given to that party, by whom it was most probable that the whole truth would be brought out. *That he [*153] could entertain no doubt that there was more chance of the truth

Re WEBB. being elicited by the nephew, who, from the position in which he stood with reference to the estates, had a sufficient and important interest in the matter, than by the daughter. That there remained the petition of the West of England Life and Fire Insurance Company. That the nephew and remainderman having already presented his petition, any petition by parties who were only incumbrancers on the supposed lunatic's estates was, in his judgment, wholly uncalled for. Incumbrancers and creditors should not come forward, unless members of the family declined to take proceedings. That strangers were looked at with jealousy, whether the struggle was for the issuing of the commission or the carriage of it. That in questions as to the issuing and carriage of commissions of lunacy, relations were, unless under peculiar circumstances, always preferred to creditors. That under the circumstances he could not regard the Company any more than as mere strangers. That the petition of the West of England Life and Fire Insurance Company must, therefore, be dismissed with costs. That the result
[*154] was that *W. F. Webb must have the carriage of the commission. That applications had been made on behalf of the West of England Life and Fire Insurance Company, and of Clara Julia Webb, for liberty to attend the execution of the commission. That from the nature of an inquisition in lunacy, a compliance with applications of this kind was entirely in the discretion of the Lord Chancellor. That there was no legal right to be present. That where such applications were granted, they often increased the costs of the proceedings by enlarging and prolonging the inquiry, even when the parties paid their own expenses of their attendance. That he believed that there had been in general a reluctance to make orders, giving parties liberty to attend the execution of a commission of lunacy by their counsel and solicitors. That there were, however, cases, and the present seemed to be one, in which there was more probability that all the facts connected with the unsoundness of mind would be brought out, if, besides the solicitors and counsel of the alleged lunatic the solicitors and counsel of other parties were present. That in such cases, being at the same time satisfied that there was no motive but fair and impartial investigation, he felt disposed to give permission to attend to a party, who either had an interest in the finding, or who was a near relation. That he should, therefore, order that both the West of England Life and Fire Insurance Company, and Clara Julia Webb, should be at liberty to attend the execution of the commission. That the former, must,

however, attend at their own expense, as their presence was not likely to be of such utility in the investigation as would warrant him in throwing the costs of it upon the lunatic's estate. The costs of Clara Julia Webb *he should reserve. That then it was asked, [*155] with reference to the 10th General Order in Lunacy of October, 1842, that Clara Julia Webb might be at liberty to propose before the Master committees of the person and of the estate. That there were cases in which an adherence to such general order plainly might lead to much inconvenience. That, for instance, it plainly might lead to much inconvenience if, where the finding of the inquisition was disputed, and before the unsoundness of mind was finally determined, committees of the person and estate were appointed, who, after all, might not be wanted. The result might be that much trouble and expense had been unnecessarily incurred. Here, it was true, there seemed little uncertainty as to what would be the finding. But, notwithstanding that, he could not now make the order that was asked. That in his opinion a prospective order, an order founded on the supposition, probably as it was, of the lunacy being found, would be premature and irregular. That the proper order in cases of this kind, where it might be fit to give a party liberty to carry in proposals for committees of the person and estate, was that the Master in lunacy should be directed, in case the inquisition should be returned, finding the lunacy, not to proceed to the approval of committees of the person or estate until further order. That it had been suggested at the Bar that it was the practice of the Masters in lunacy in the appointment of committees, unless there was some special reason for not following the practice in the particular case, to give a preference to the proposal of the party who, upon a contest, had succeeded in obtaining the carriage of the commission. That he had never heard of such a practice. That if such a practice existed, which he could not believe, it was a most improper practice, and he certainly should not sanction it.

RE BUSHNELL.

(2 Coop. temp. Cott. 163.)

1821. *June.*

Lord ELDON, L.C. [163]

LORD ELDON:

Before an order can be duly made for issuing the commission *de lunatico inquirendo*, a creditor or other person interested in the supposed lunatic's estate, lodging a *caveat*, must have proper notice.

1809.
July.

Lord ELDON, L.C.
[163]

RE BEDELL.

(2 Coop. temp. Cott. 163.)

LORD ELDON:

A stranger may petition, but the next natural relation, if he desires it, and no objection exists, ought nevertheless to have the carriage of the commission (1).

1831.
April.

Lord BROUGHAM, L.C.
[163]

RE GREEN.

(2 Coop. temp. Cott. 163.)

LORD BROUGHAM:

The party likely to be most instrumental in attaining the object of a commission of lunacy, should have the carriage of it.

1846.
July 30.

Lord COTTENHAM, L.C.
[177]

EDWARDS *v.* ABREY.

(2 Coop. temp. Cott. 177—190.)

The opinion of the Master that money actually expended by the husband for the past maintenance of his wife, who was in an unsound state of mind, ought, on the ground of his inability to support her, to be repaid to him by a sale of part of the capital of her separate property, not adopted.

Order (by LORD CHANCELLOR not sitting in lunacy) that the sum found by the Master proper to be allowed for the future maintenance of the wife, should be paid to the husband out of her separate income, arising from the stock standing to the credit of the cause, he not being of ability to maintain her.

The husband, not of ability to maintain his wife, allowed to receive that part of the income of her separate property, which was not required for her maintenance, until money advanced by him for her past maintenance was repaid.

THE plaintiff was executor and trustee under the will of Griggs, the father of the defendant Maria Abrey, dated in the year 1823, by which will it was declared that the share and proportion of the residue to which the defendant Maria Abrey, then Maria Griggs, was entitled as one of the testator's daughters, should not be subject to the debts or control of any husband with whom she might intermarry, but should be for her sole and separate use, and her receipt notwithstanding her coverture was to be a good discharge for the same. The bill stated the death of the testator, and the intermarriage of the defendants in his lifetime. That the share of the defendant Maria Abrey in the residuary personal estate of

(1) From a MS. in the author's possession.

the testator, consisted of the sum of 1,800*l.* 3*l.* per cent. Consols, and of the sum of 1,370*l.* *3*l.* per cent. Reduced Annuities, together with a sum of cash. That the plaintiff was desirous of transferring [*178] and paying to the defendant Maria Abrey the said stock and cash, and of being thereupon released and discharged in respect of the trust; but the plaintiff was informed, and believed it to be the fact, that the defendant Maria Abrey was not of sound mind or capable of transacting business, or of signing or executing to the plaintiff any receipt or release in respect of her share of the said trust property, and that the defendant Maria Abrey was then by the authority of some certificate issued by physicians or surgeons, duly qualified in that behalf, under restraint at an asylum for persons of unsound mind. That no commission, however, had issued to inquire into the state of mind or competency of the said defendant Maria Abrey for the management of her affairs, and no committee of the estate of the said defendant Maria Abrey had been appointed. That the plaintiff was entitled, upon transfer and payment of the said trust funds as the Court should direct, to be released and discharged in respect of the same. The bill prayed that the plaintiff might, upon transfer or payment unto the defendant Maria Abrey of her share in the said residuary personal estate of the testator, in case she should appear to be of sound mind, be released and discharged in respect of the trust thereof. But if it should appear by the proceedings in the cause that the defendant Maria Abrey was of unsound mind, then that the plaintiff might be at liberty under the order of the Court to transfer into *the name of the Accountant-General in [*179] trust in the cause the said several sums of 1,800*l.* 3*l.* per cent. Consolidated Bank Annuities, and 1,370*l.* 3*l.* per cent. Reduced Annuities, and might also be at liberty under the like order to pay into the Bank in the name of the said Accountant-General in trust in this cause the sum of cash in the said bill mentioned, and thereupon that the plaintiff might be released and discharged under the indemnity of the order of the Court in respect of the said trust moneys and premises respectively. And that so much of the said trust moneys as should be necessary, might be applied in the payment to the plaintiff of his costs of the suit.

The answer of the defendants Daniel Abrey and his wife, she answering by him as her guardian, stated amongst other things that they intermarried in 1824, and that about the month of June, 1838, she was afflicted with severe illness, and became of unsound mind and unable to manage herself or her affairs.

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By the decree and an order made at the same time in the cause upon the petition of the defendant Daniel Abrey, 13th December, 1845, it was decreed that the plaintiff should on or before the 31st day of January, 1846, transfer and pay into the name and with the privity of the Accountant-General of this Court in trust in and to be placed to the credit of the cause, subject to the further order of the Court, the said 1,800*l.* Bank 3*l.* per cent. Annuities, and 1,370*l.* Reduced Annuities, and the cash therein mentioned, and any dividends which might accrue due on the said Bank Annuities respectively until such transfer and payment, the same to be received by the said plaintiff and the amount to be verified by affidavit, and the said Accountant-General was to declare the trusts of the said Bank Annuities accordingly subject to the further order of the Court; and it was ordered that the costs of all parties should be taxed and paid out of the cash aforesaid [arising from dividends], and out of any future dividends; and if the same were not sufficient for that purpose, by sale of a part of the 1,370*l.* Reduced Bank
[*180] *Annuities: and it was ordered [upon the petition of the defendant Daniel Abrey] that it should be referred to the Master to inquire and state how and under what circumstances and at whose expense the defendant Maria Abrey, the wife of the petitioner, had been maintained and provided for in and since the month of June, 1838, and what had been the amount of such expenditure, and whether the petitioner was of ability to maintain her, regard being had to her fortune and her situation, and comfort, and to the number of the children of the petitioner and his said wife, and the provision necessary to be made by the petitioner for them, and what would be fit and proper to be allowed for such past maintenance and provision of or for the petitioner's said wife, and whether out of any and what fund to be administered in this suit, and to whom the same ought
[*181] to be paid, and what *would be fit and proper to be allowed for the like maintenance and provision of or for the petitioner's said wife for the time to come, until the further order of the Court, and whether out of any and what fund to be administered in this suit, and to whom and upon what security such future allowance ought to be paid, and from what time the same ought to commence.

In pursuance of this decree and order, the Master made his report, dated the 4th July, 1846. And he found that the defendant Daniel Abrey had three children by his wife of the names and ages therein mentioned; and that his said wife, some time after the birth of the said three children, became of unsound mind, and in

or about the month of June, 1838, she was removed to an asylum therein mentioned, and she continued at such asylum to the month of October, 1839, when she returned to the residence of her said husband, and continued there until the month of November, 1840, she being and continuing still of unsound mind; and in the said month of November, 1840, she was again removed from the residence of the said defendant, D. Abrey, to an asylum at Kensington, and continued there until the month of February, 1841, when she was removed to St. Luke's Hospital, where she continued one year, and being then declared to be incurable, she was again removed to the said asylum at Kensington, where she had remained ever since. And the said Master found that the expenses of maintaining and supporting the defendant Daniel Abrey's said wife during the time she had been afflicted, and of providing her with proper advice and attendance, and other necessaries, had, in and from the said month of June, 1838, down to the then present time, been borne and paid by him *by and out [*182] of his own proper moneys, and that he had properly expended in that behalf sums of money, amounting together to the sum of 413*l.* 8*s.* 6*d.* And the said Master found, that the defendant Daniel Abrey occupied a farm of about 100 acres, and his income, including the average profits of his said farm for the last seven years, had not exceeded the annual sum of 100*l.*, and had, during all that time, been altogether insufficient to defray his expenses incurred on behalf of his said wife, and to maintain himself and his said children, and to educate the latter; and that the defendant Daniel Abrey had accordingly withdrawn and expended, from the capital of his property, the said sum of 413*l.* 8*s.* 6*d.*, so expended by him on behalf of his said wife as aforesaid. The report then stated a proposal of the defendant Daniel Abrey. And upon due consideration of the said proposal, and of the evidence in support thereof, the Master found that the defendant Daniel Abrey was not of ability to maintain his said wife, regard being had to her fortune and her situation and comfort, and to the number of the children of the defendant Daniel Abrey, and his said wife, and the provision necessary to be made by the defendant Daniel Abrey for them. And the said Master was of opinion, that the said sum of 413*l.* 8*s.* 6*d.*—expended by the defendant Daniel Abrey for past maintenance and provision of or for his said wife up to the 18th day of February, 1846—should be paid to him by sale of a sufficient part of the said 1,370*l.* 3*l.* per cent. Reduced Bank Annuities, being

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part of the fund to be administered in this suit. And the said Master was also of opinion, that the sum of 70*l.* a year was fit and proper to be allowed to the defendant Daniel Abrey for the maintenance and provision of his said wife from the said 18th day of February, 1846, and that the same should be paid out of the dividends to accrue due on the residue, if any, of the said 1,370*l.* 3*l.* per cent. Reduced Annuities, after payment of the said sum of [*183] 413*l.* 8*s.* 6*d.*, and the costs by the said decree *directed to be paid out of the said Reduced Annuities, and also out of the dividends of the said 1,800*l.* Bank 3*l.* per cent. Annuities, also standing in the name of the said Accountant-General in trust in this cause as aforesaid, being the remaining fund to be administered in the suit. And the said Master was further of opinion, that the defendant Daniel Abrey ought to enter into his own recognizance to apply the said yearly sum of 70*l.* so long as the defendant Daniel Abrey should continue to receive the same, in and for the future maintenance and provision of his said wife in the manner proposed by him.

The costs mentioned in the decree, and also the legacy duty, which it afterwards appeared that the plaintiff had omitted to pay, were paid out of the dividends as far as the same would extend: and the deficiency was raised and paid by sale of part of the 1,370*l.* Reduced Annuities, which thus become diminished to the sum of 1,356*l.* 1*s.* 4*d.*

The defendant Daniel Abrey for himself, and as guardian for the purposes of the suit of the defendant Maria Abrey, his wife, presented a petition, praying, that the Accountant-General might be directed to sell so much of the said 1,356*l.* 1*s.* 4*d.* Reduced Annuities as would be sufficient to raise the said sum of 413*l.* 8*s.* 6*d.*, found, by the said Master's said report to have been borne and paid by the defendant Daniel Abrey, by and out of his own proper moneys, in the expenses of maintaining and supporting his said wife, during the time she had been afflicted, and of providing her with proper advice and attendance, and other necessaries, from the month of June, 1838, down to the 18th February, 1846, as in the said Master's said report is mentioned and set forth, and that the same, when sold, might be paid to the said defendant Daniel Abrey; and also that the sum of 70*l.* a year—which the said Master, by his said report, was of opinion was fit and proper to be allowed to the defendant Daniel Abrey for the future maintenance and provision of his said wife, from the said 18th day of February, 1846, [*184] until the further order of the Court—might be paid to the *said defendant Daniel Abrey out of the dividends, to accrue due on the

said 1,800*l.* 3*l.* per cent. Annuities, and the residue of the said sum of 1,356*l.* 1*s.* 4*d.* after the sale to be made thereout as aforesaid.

This petition came on now to be heard before the Lord Chancellor.

Mr. Greene for the defendants, and in support of the petition, cited *Brodie* v. *Barry* (1).

Mr. Hare for the plaintiff.

The LORD CHANCELLOR said, that he must decline to adopt the opinion of the Master, that money actually expended by the husband for the maintenance of his wife, ought, on the ground of his inability to support her, to be repaid to him by a sale of part of the capital of her separate property. That he did not recollect any instance, in which an order of the kind now prayed had been made by the Court. That if any precedent for such an order were produced, he nevertheless should hesitate to follow it. That the case of *Brodie* v. *Barry*, had little resemblance to the present case. That there the application was *not that any part of the stock [*185] should be sold, but merely for a reference to the Master to inquire whether it would be for the benefit of the wife, that the whole or any part of the dividends should be paid to the husband. That there the wife was entitled to the dividends only during her life, and no more. There was a trust of the capital stock after her death for her children. That in that case, therefore, no part of the capital stock could be sold. That in the present case, however, the wife was entitled to the fund to her separate use absolutely. That there might, or might not, be circumstances in which the Court would do what, from the limited title of the wife, could not be done in *Brodie* v. *Barry*. That if the parties, who had had the care of the wife, were still unpaid, there might, or might not be, ground for taking a portion of the fund in order to satisfy the amount due to such parties. That it was not necessary for him to determine that point, as it was not suggested that there were unsatisfied debts of the husband arising out of the maintenance of the wife. That it might be truly said that, by paying, the husband had shown the ability to pay as regarded the past, however inconvenient and embarrassing the payment might have been by reason of the smallness of his income. That what the Court had principally to consider was the future maintenance of the wife, and that not only during the

(1) 13 R. R. 6 (2 V. & B. 36).

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coverture, but in the event of her husband's death and her surviving him. That was a strong reason for not breaking into the capital fund. That in applications of this description it was true that the Court would consider not only what was for the benefit of the lunatic, but also in some degree what was for the benefit of the members of the lunatic's family. That the very fact that the means of the husband were so slender, how that the wife had

[*186]

hitherto been actually maintained, *and the extraordinary expenses occasioned by her unfortunate condition had been actually paid, was a reason why it was not, and could not be, the interest of the wife, that the *corpus* of her separate estate should be diminished, by throwing any charge upon it to which it was not liable. That probably it was equally the interest of the members of the family that there should be no such diminution. That there were, however, charges upon the capital, which it was admitted had been paid out of the income; he meant part of the costs of the suit and the legacy duty. There was no reason why these should not have been raised and paid by a sale of the *corpus*, instead of by an application of the dividends. He should direct that the amount of the costs and legacy duty, paid out of dividends, should be raised by sale of stock and paid to the husband towards the discharge of the 413*l.* 8*s.* 6*d.* The subsequent costs of the suit and of the present application would, in like manner, be raised by a sale of the stock. That as to the payment to the husband of the 70*l.* a year, which the Master found to be a fit allowance for the maintenance of the wife for the time to come, there could be no doubt. Here the husband was not of ability to maintain the wife. In *Brodie* v. *Barry*, it was different. The husband was there admitted to be of ability to maintain the wife. That it was plain that Lord ELDON thought that that circumstance raised a difficulty. That Lord ELDON there said it was true that if the husband received from the trustees the wife's separate maintenance, the Court would not charge him with more than one year's income: but that was upon the notion of her consent to make it a common fund for the expense of the family, and the case before him was the case of a person incapable of consenting, and, therefore, not within the rule which

[*187]

guides the Court in those instances. Lord ELDON saw *there would be a manifest inconsistency in permitting the husband to take the wife's separate income upon the principle of an implied consent, where the wife was altogether incompetent to consent. This seemed a sufficient reason for Lord ELDON's hesitation, where

the income was not wanted for the wife's maintenance. The acknowledgment that the husband was able to support the wife was, therefore, a difficulty. That it was not very clear why Lord *ELDON had directed an inquiry whether the husband was of ability [*188] to maintain the wife, when the husband's counsel had stated that there was no doubt of his ability. Nor was it clear what Lord ELDON would have done, upon the report of the Master finding the affirmative of the inquiry. The language of Lord ELDON, however, left no doubt that, where the husband was not of ability to maintain the wife, the Court would direct that her separate income should, if a commission were taken out, be applied for that purpose. That where the property was too small to admit of a commission being taken out, and there was a suit, and a fund to the credit of the suit to which the wife was entitled, the Court *had a power very like [*189] that of the Lord Chancellor sitting in lunacy. That he should therefore order that the sum found by the Master proper to be allowed for the future maintenance of the wife, should be paid to the husband out of her separate income, arising from the stock standing to the credit of the cause, he not being of ability to maintain her. With regard to the surplus dividends, exceeding the 70*l.* a year, which the Master had reported was fit and proper to be allowed to the husband for the maintenance of his wife—no doubt if the wife were of sound mind and living with her husband, she would apply the entire dividends for the common benefit of herself and husband. Could the Court do that for her? Without determining whether in general there was ground to permit a husband to receive that part of the separate income of the wife, whilst in a state of lunacy, which was not required for her maintenance and support, he nevertheless, thought that in the circumstances of the case then before him—the embarrassment which the past maintenance of the wife had occasioned to the husband—there was a ground for allowing him to receive the surplus dividends. He should therefore allow the husband—he not being of ability to maintain his wife—to receive that part of the income of her separate property, which was not required for her maintenance, until the money advanced by him for past maintenance was repaid. That it was not necessary now to consider whether there could be any appropriation of the surplus dividends, not wanted for the maintenance of the wife, after the husband's debt was liquidated. But it would not be going too far if such appropriation were directed, until the payment of the debt. That the process of repayment

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would indeed be slow. He could, however, do no more. That the Master had reported that he was of opinion that the husband ought to enter into his own recognizance, duly to apply the sum allowed for the maintenance of the wife. That this was unnecessary. That if a commission of lunacy were taken out, and the husband [*190] were appointed committee of the person of the wife, *no security would be required from him for the due application of the sum allowed for her maintenance.

1824.
September.
October.
November.

Lord ELDON, L.C.

[358]

NATUSCH *v.* IRVING (1).

(2 Coop. temp. Cott. 358—405.)

It is not competent to any number of persons in a partnership (unless they show a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for very different purposes, to effect that formation by calling upon some of their partners to receive their subscribed capital and interest and quit the concern and (in effect) by compelling them merely to retire upon such terms, so to form a new Company.

The right of a partner is to hold to the specified purposes his partners whilst the partnership continues, and not to rest upon indemnities with respect to what he has not contracted to engage in.

That a dissatisfied partner may sell his shares for double what he originally gave for them, is no reason for compelling him to part with them.

If six persons join in a partnership of life assurance, it seems clear that neither the majority, nor any select part of them, nor five out of the six, can engage that partnership in marine insurances, unless the contract of partnership, expressly or impliedly, gives that power.

The principles which a Court would act upon, in the case of a partnership of six, must, as far as the nature of things will admit, be applied to a partnership of 600.

They who seek to embark a partner in a business not originally part of the partnership concern, must make out clearly that he did expressly, or tacitly, acquiesce.

IN February, 1824, the defendant Rothschild having set on foot a plan for the formation of a proprietary Company of partnership [*359] for the effecting of life and fire assurance, *the plaintiff in the month of February, 1824, addressed a letter to Mr. Cohen, the agent of the defendant Rothschild, requesting that he might be allowed to become a subscriber or member. In answer to such letter the plaintiff received a printed letter dated the 15th March, 1824, signed by the defendant Rothschild, and referring him to the annexed prospectus, and informing him that his name was inserted for fifteen shares in the Company and desiring him to pay on or before the 19th instant 10*l.* per share at the Company's office; and

(1) Partnership Act, 1890, s. 24 (8).

it was stated in a postscript to the letter that the Company would commence business on the 23rd instant. The prospectus annexed to the letter was a printed prospectus, and was headed and entitled "The Alliance British and Foreign Fire and Life Assurance Company. Capital, 5,000,000*l.* sterling." It stated that the defendants Irving, Baring, Gurney, Rothschild, and Montefiore were the presidents, and the other defendants were the directors of the Company. That the capital of the Company was divided into 50,000 shares of 100*l.* each. That an immediate call would be made of 10*l.* per share, *and that every shareholder, as a condition [*360] for holding his shares, would be required to insure a sum equal to the amount of his subscription in the fire, or 1,000*l.* in the life department of the Company. The prospectus further stated that in addition to the specified objects of the institution, viz. fire and life assurances, it was intended that the Company should grant life annuities, endowments for infants, and benefit policies in all cases connected with life contingencies, and should avail itself of the advantages continually offering in the purchase of life contingent risks, and such other descriptions of property as the law might sanction.

The several defendants named as presidents and directors took upon themselves the offices of presidents and directors of the Company, and were privy and assenting to the publishing of the prospectus, and authorized the printed letter signed by the defendant Rothschild and addressed and sent to the plaintiff, and had ever since acted as the presidents and directors of the Company. On the 19th of March the plaintiff paid the instalments on his fifteen shares, as required by the letter and prospectus, and in further compliance with the stipulation in the prospectus the plaintiff effected, as such member or shareholder, an insurance on his own life for 1,500*l.*, and on the 31st May, 1824, paid as such shareholder and partner the amount of the premium. The plaintiff upon that occasion received the following printed certificate signed by the defendant Rothschild: "Alliance British and Foreign Life and Fire Assurance Company, No. 4, New Court, St. Swithin's Lane. Capital, 5,000,000*l.* sterling. This is to certify that Frederic Natusch, Esq., of St. Swithin's Lane, has become a subscriber for fifteen shares of 100*l.* each in the Alliance British and Foreign Life and Fire Assurance Company, on which 10*l.* per cent. have been paid, and that on executing such deed or deeds as the board of directors shall deem requisite for furthering the objects stated in the prospectus, the said Frederic Natusch, Esq.,

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will be entitled as a proprietor of the said shares to all the benefits and emoluments *thereof. This certificate to be void, and the
[*361] deposit to be forfeited, on failure to execute such deed or deeds within three months after notice in the *London Gazette*. London, 24th March, 1824—N. M. ROTHSCHILD. Entered in the Company's books, L. D. (no assignment is valid unless regularly made in the books of the Company), No. 35,220—35,234."

The Company appointed Mr. Andrew Hamilton as their secretary, and commenced business on the 23rd March, as announced by letter, under the management and superintendence of the defendants, as presidents and directors, in the effecting of insurances and granting policies in the fire and life departments, and transacted business to a considerable extent, and was in a prosperous and flourishing condition.

* * * * *

[363] On the 10th August, 1824, notice was inserted in the *London Gazette*, that a deed had been prepared under the direction of the defendants, presidents and directors of the Company, for the signature of the subscribers to and partners in the Company; but the plaintiff did not see or hear of it until the plaintiff received from Mr. Hamilton, the secretary to the Company, the letter of the 30th August, 1824, presently mentioned. This deed contained a recital * * that it was intended to extend the objects of the Alliance British and Foreign Life and Fire Assurance Company to marine insurances, and lending money on bottomry, and it contained the necessary provision for enabling the Company to carry on such business.

On the 27th August, 1824, an advertisement appeared in the newspapers, dated the 25th of that month, announcing, that the Company would commence the business of marine insurance on the following Wednesday. On the same 27th of August the plaintiff wrote to Mr. Hamilton, the secretary of the Company, [to inquire respecting the notice and to point out that the proceeding would materially affect his interest]. Mr. Hamilton having laid the plaintiff's letter before the board of the directors of the company, returned to the plaintiff the following answer: "ALLIANCE OFFICE, LONDON, 30th August, 1824. SIR,—I have laid your letter of the 27th instant before the board of direction of the Alliance Company, and am
[*364] desired by them to return you the following *answer to it. The rumour to which you allude is well founded: the Company will commence marine-assurance business on the first of September. The board, however, do not consider that your interest can be

prejudiced by this determination. It is true that fifteen shares were assigned to you by Mr. Rothschild at your particular request, upon which shares you have paid a deposit of 10*l.* per cent. But as you have not executed the deed of settlement, and as your name is not enrolled under the Act, you are not subject to any of the liabilities attached to the Company. If you are dissatisfied with the course intended to be pursued, you may receive back your deposit with interest from the date of its payment, and the board request you will consider this as a regular tender thereof. With regard to the insurance effected by you on your life, and which (looking either to the date of the proposal for or of the completion of it) must have been so effected with knowledge on your part that the Company intended to carry on the business of marine assurance, the board are ready and willing to cancel the policy and return the premium, and to assist you in transferring your assurance to any other office in whose solidity you may have more confidence than in that of the Alliance. I remain, Sir, your most obedient servant, A. HAMILTON, secretary." The plaintiff in reply to this letter, wrote to the secretary to the Company [on August 31, 1824, strongly protesting against the unauthorized employment of the capital of the Company in the business of marine insurance].

On the 1st September, the defendants, the presidents and directors, began to carry on the business of marine insurance—underwriting ships, and their cargoes and freight, against the perils of the sea. No general meeting of the shareholders was ever convened to consent to the Company engaging in the business of marine insurance.

On the 11th September, 1824, the present bill was filed, praying an injunction to restrain the defendants, *and the clerks, agents, [*365] and servants of the Company, from effecting marine insurances, or transacting the business of underwriting or insuring ships, or their cargoes or freight, against the perils of the sea, and from lending money on bottomry in the name or on the account of the Company, and from using the name of the Company for such purposes, and also from carrying on the business of underwriting or lending money on bottomry in any other name or firm at the place of business where the business of the Company had been hitherto carried on, and from applying the capital of the Company to any of such purposes (1).

(1) Mr. Gow, in the statement of this case inserted in the Appendix to his Treatise on Law of Partnership, mentions that the bill prayed a dissolution of the partnership, and if necessary a receiver.

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A petition was presented to the Lord Chancellor praying an injunction. An affidavit of the plaintiff in support of the petition stated all the foregoing matters.

* * * * *

On the 15th September, the solicitor for the defendants appeared on their behalf before Lord Eldon to oppose the application for an injunction.

Lord ELDON intimated that the defendants ought not to advertise for marine insurances pending the application for an injunction—

[*366] and the solicitor for the defendants *undertook that the business of the Company should be confined to as few marine risks as possible.

An affidavit of the defendant Rothschild, and other affidavits, were filed in opposition to the petition for the injunction. The affidavits in opposition alleged that, shortly after it had been determined to form the Alliance Company, the existence of an intention to apply for an Act of Parliament or charter enabling the Company to effect marine insurances was currently reported, and was a common subject of conversation amongst mercantile men. That when the plaintiff proposed to become, or at least when he actually became, a partner or shareholder he had notice, or it was in some way intimated to him, that marine insurance was to form one of the objects of the Company. That about the end of March, 1824, the daily newspapers made repeated allusions to this subject, and that it was quite impossible that the plaintiff must not himself have been aware of the fact. That the insurance by the plaintiff on his own life of the sum of 1,500*l.* effected in compliance with the condition contained in the prospectus, was not completed and the premium paid until the 31st May, 1824. That at that time, from proceedings in Parliament relative to the passing both of the Company's Act, and of the Act for the repeal of part of the Act of 6 Geo. I., it was matter of notoriety that there was an intention of engaging the Company in marine insurances. That the plaintiff must under the circumstances be considered to have acquiesced, and that he did in fact acquiesce, in the Company engaging in the business of marine insurance. That the suit was instituted, not of the plaintiff's own free will and accord, but there was some direction from a committee, or from the members of Lloyd's Coffee House, and that the suit was not instituted and carried on for the benefit and advantage of the plaintiff himself, but was promoted and instigated by a committee of underwriters at Lloyd's, and it was meant and intended that the costs and charges should be borne

and paid by them. That the deed of settlement had been executed by more than 340 *shareholders, who held upwards of 22,400 shares. The defendant Rothschild by his affidavit intimated, that the plaintiff could not have relied upon the statements in the prospectus when, in February, 1824, he offered to become a shareholder, inasmuch as the prospectus was not then prepared and was not in fact issued and made public until the 15th March. With regard to the interview on the 5th June, 1824, mentioned in the affidavit of the plaintiff as having taken place between the defendant Rothschild and him the plaintiff, the defendant Rothschild by his affidavit admitted having had such interview with the plaintiff, and that the plaintiff at such interview objected to the Company extending its operations to marine insurance, but he denied that the plaintiff then stated his opinion of the impolicy or danger of a joint-stock Company undertaking the risks of marine insurance. [*367]

The plaintiff desired an opportunity of replying to the affidavits in opposition.

Several affidavits on the part of the plaintiff were filed in reply. The plaintiff by his affidavit in reply set forth his letter to Mr. Cohen, the defendant Rothschild's agent, dated 24th February, 1824, in which he had stated that he should be one of the first to offer an insurance on his own life when the arrangements were completed; and he denied that when he became a shareholder on the 19th March, any notice was received by him that marine insurance was to form part of the business of the Company. He stated that although the balance of the premium for the insurance, which he had effected on his own life for the sum of 1,500*l.*, was not paid until the 31st May, yet that, independent of the offer to insure his life contained in the aforesaid letter to Mr. Cohen, the proposal for such insurance was formally made by him on the 29th April, and a small sum of money was then paid by him on account of the premium. That at that time he neither knew, nor had reason to believe, that the Company would engage in the business of marine insurance.

* * * * *

Lord ELDON having read the affidavits in reply, put into *writing [368] (September, 1824) remarks upon the case stated by the petition [*369] for the injunction, and the affidavits in support of it, and the affidavits in opposition. The following is a copy of extracts (made in December, 1824) from those remarks:

Extracts from Lord ELDON's written remarks of September,

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1824: If the Alliance Company, being formed to effect assurances upon lives and survivorships and against loss or damage by fire, cannot by express contract, or authority by implication vested in its directors, or any select part of its body, engage the partners in marine risks—and if the plaintiff on behalf of himself and others has a right to prevent the Company, as that Company, from so doing—several points are made on the part of the defendants against the plaintiff: [First] It is urged that the plaintiff has not executed the deed of settlement. To this it may be answered that if the Company had no right to engage him in marine risks, they had no right to tender to him for execution any deed which did so engage him. [Secondly] An offer is made to the plaintiff that he may receive back his deposit with interest, from the date of the payment, and he is desired to consider himself as having received notice thereof. But it is not, I apprehend, competent to any number of persons in a partnership (unless they show a contract rendering it competent to them) formed for specific purposes, if they propose to form a partnership for very different purposes, to effect that formation by calling upon some of their partners to receive their subscribed capital and interest and quit the concern, and in effect merely by compelling them to retire upon such terms, so to form a new Company. This would, as to partnership, be a most dangerous doctrine. Where a partnership is dissolved (even [*370] where it can be in a sense dissolved the instant after *notice to dissolve is given, if there be no contract to the contrary) it must still continue for the purpose of winding up its affairs, of taking and settling all its accounts, and converting all the property, means, and assets of the partnership existing at the time of the dissolution, as beneficially as may be for the benefit of all who were partners, according to their respective shares and interests: and the other partners cannot say to whom they have given an offer of his deposit and interest, Take that and we are a new Company—keeping the effects, means, assets and property of the old as the property of the new partnership. [Thirdly] The Company will indemnify the plaintiff against loss by its transactions already had, or hereafter to be had, not for the specified purposes of the institution. But the right of a partner is to hold to the specified purposes his partners whilst the partnership continues, and not to rest upon indemnities with respect to what he has not contracted to engage in. [Fourthly] A dissatisfied partner may sell his shares for double what he originally gave for them. But he cannot

be compelled to part with them for that reason: it may be his principal reason for keeping them, having the partnership concern carried on according to the contract. The original contract and the loss, which his partners would suffer by a dissolution, is his security that it shall be so carried on for him and them beneficially, and with augmented improvement in the value of his shares and their shares. [Miscellaneous remarks:] If six persons joined in a partnership of life assurance, it seems clear that neither the majority nor any select part of them, nor five out of the six, could engage that partnership in marine insurances, unless the contract of partnership expressly, or impliedly, gave that power: because if this was otherwise an individual or individuals by engaging in one specified concern might be implicated in any other concern whatever, however different in its nature, against his or their consent. But if a part of the six openly and publicly professed their intention to engage the partnership in another concern, *and [*371] clearly and distinctly brought this to the knowledge of one or more of the other partners, and such one or more of the other partners could be clearly shown to have acquiesced in such intention, and to have permitted the other partners to have entered upon and to have engaged themselves and the body in such new projects, and thereby to have placed their partners so engaged in difficulties and embarrassments unless they were permitted to proceed in the farther execution of such projects—if a court of equity would not go the length of holding that such conduct was consent, it would scarcely think parties so conducting themselves entitled to the *festinum remedium* of injunction. It may be taken that the principle that would apply to the partnership of six will apply to this partnership of 600 or 700. There is much difficulty in applying the rules of law and equity to societies constituted of numbers of persons, not incorporated. Much has been done with respect to the difficulty alluded to, by provisions how those who have demands upon such societies are to sue, and how such societies are to be sued. Much remains to be done, and particularly as to rendering simple and effectual the remedies of the members of such societies against each other. Shares may devolve to *feme coverts*, infants, &c., but whatever are the difficulties, Courts must struggle to remedy them, and to prevent particular members of those bodies from engaging other members in projects in which they have consented to be engaged, or the engaging in which they have not encouraged, assented to, empowered or acquiesced in, expressly or tacitly, so as to make it

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not equitable that they should seek to restrain them. The principles, which a Court would act upon in the case of a partnership of six, must, as far as the nature of things will admit, be applied to a partnership of 600. They, who seek to embark a partner in a business not originally part of the partnership concern, must make out clearly that he did expressly, or tacitly, acquiesce.

* * * * *

[373] On the 18th of October Lord ELDON made an order that the defendants should show cause at the next seal why an injunction should not be granted as prayed; and with reference to the allegation in the further affidavit of the plaintiff in reply, that the defendants had continued to advertise for marine insurances pending the application for the injunction, and that the defendant Rothschild, notwithstanding the engagement of the solicitor for the defendants, had used great exertions to increase the business of the marine department. His Lordship gave the plaintiff liberty at the next seal, or at any other time, to apply to the Court as he might be advised respecting any transactions of the defendants since the filing of the bill.

* * * * *

[374] Upon the 4th November cause was to be shown by the defendants against granting an injunction.

Mr. Solicitor-General (*Sir Charles Wetherell*), *Mr. Heald*, and *Mr. Sidebottom* for the defendants, said that they had perused and carefully considered the remarks which his Lordship had been so good as to transmit to the parties, before the order of the 18th of October, calling upon the defendants to show cause why an injunction should not be granted against their effecting marine insurances had been drawn up, and that they had come to the conclusion that no arguments which could be brought forward on the part of the defendants, would be considered by the Court as a satisfactory answer to such remarks. They therefore looked upon the question as decided, and should not oppose the order for the injunction being made.

Mr. Hart, *Mr. Knight*, and *Mr. Anderdon* appeared for the plaintiff.

LORD ELDON:

During the vacation, whilst in the country, I gave considerable

attention to this novel and important case. The parties litigating are members of a joint-stock Company entitled, if I recollect right, the British and Foreign Life and Fire Insurance Company. Mr. Rothschild framed the plan of the Company, and there is a capital of 5,000,000*l.* The Company was formed in the spring of the year, and the prospectus states what the objects of the Company are. There were many minor points, but the great question was, whether marine insurances came within the scope of the prospectus, and it *being [*375] clear that it did not, could that business be comprehended without the consent of all the shareholders or partners? It appeared before me that the great majority, I forget what proportion, was for extending the business to insuring marine risks. Mr. Natusch, a member of Lloyd's, objected. It appeared also from the affidavits that some other of the members or shareholders objected. They thought, whether rightly or wrongly appears to me immaterial, that it would not be for the benefit of the concern to engage in this new business. The prospectus is silent as to a business of this kind. There is nothing giving the defendants, the presidents and directors, any authority, express or implied, to enter into any description of business, which is not pointed out by the prospectus. Mr. Natusch says, I will not have the joint capital employed in this new concern. The point of the case appears to me to be a very simple one. If A., B., and C. are partners, and B. and C. choose to embark in a new trade, are they to have the power of compelling A. to join his share of the capital with them in such new trade? If he will embark in the new trade, are they to have the power of driving him out of the old concern by offering to return him his capital? That was what was proposed here. The defendants say, We will place the plaintiff in the same situation in which he was before he became a shareholder. This the plaintiff declined, and I think he had a right to do so. I have no hesitation in deciding that two partners cannot drive a third out of the concern, upon no other ground than because he declines to engage in some new business which there is no power, express or implied, to undertake without his consent. The principle must be the same whether the partnership be of three, or three hundred. There was a deed executed by the greater part of the shareholders, enabling the defendants to carry on the business of marine insurance; but the plaintiff had refused to execute it, and I thought he had a right so to refuse. The defendants also raised a question as to acquiescence, and as to the suit not being that of *the plaintiff, but that of a committee of Lloyd's Coffee [*376]

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House. It appeared to me in October that these objections had not been substantiated. The notes, which have been alluded to, were drawn up by me with some haste, and were not intended exactly as the reasons of my decision, but as suggesting matters for further consideration and inquiry. Parties have however a right to know the exact ground upon which a Judge's opinion is formed, and if my written notes are returned to me I will put them into a more correct shape.

Order for injunction.

1804. *July.*

LASHLEY *v.* HOG (1).

(2 Coop. temp. Cott. 449—496; S. C. 4 Paton, 581.)

In the House of Lords upon Appeal from the Court of Sessions.

Lord ELDON, L.C.

EARL OF ROSSLYN.

A native of Scotland, settled in London as a merchant, intermarried with a native of England. There was a marriage contract. At the dissolution of the marriage, by the death of the wife, the domicile of the husband was in Scotland:

Held by the House of Lords, reversing the decision of the Court of Session—the marriage contract not being so conceived as to bar a claim to legal provisions—that the pursuer, a daughter of the marriage, had therefore a claim in the right of the wife, her mother, to a share of the moveable estate of her father, the husband, at the time of her mother, the wife's death.

[449]

[*450] ROGER HOG, a native of Scotland, having settled in London as a merchant, married there, in 1737, Miss Rachael Missing, *of Shebbington, in the county of Southampton. A marriage contract made on that occasion, to which Mr. Hog of the first part, his intended wife of the second, and William Rickman and Thomas Missing of the third, were parties, after reciting that the lady possessed a personal estate of 3,500*l.*, contains the following covenants: "The said Roger Hog, his heirs, executors or administrators, shall and will, with all convenient speed, after the intended marriage shall be solemnized, and as soon as a purchase can and reasonably may be had, expend, lay out, and dispose of the sum of 2,500*l.*, part of the said sum of 3,500*l.*, or any farther sum, if the same shall be wanting, as will purchase some good estate or estates of inheritance, in messuage, lands, tenements, or other hereditaments, in fee simple, of the clear yearly value of 100*l.*, in any county within that part of Great Britain called

(1) This report was compiled by Mr. Cooper from an abstract made in the year 1823 from the printed cases of the litigants in the House of Lords. The case is distinguished in *De Nicols* v. *Curlier* [1900] A. C. 21, 69 L. J. Ch. 109, 81 L. T. 733, where there was by the law of the place of marriage (France) an implied statutory contract which defined the rights of the contracting parties in after-acquired property devolving at the death of husband or wife.—O. A. S.

England; and immediately after such purchase made, shall convey, settle, and assure the same unto or upon the said William Rickman and Thomas Missing, for the use and behoof of the said Roger Hog, for and during the term of his natural life; and from and after the determination of that estate, to the use of the trustees, to be for that purpose named, and their heirs, for and during the life of the said Roger Hog, in trust to preserve the contingent uses thereof from being destroyed, and not that they shall receive the profits thereof to their own use; and from and after the decease of the said Roger Hog, to the use and behoof of the said Rachael Missing, his intended wife, for and during the course of her natural life; and from and after the several deceases of the said Roger Hog and Rachael Missing, his intended wife, then to the use and behoof of such child or children of the body of the said Rachael Missing by the said Roger Hog lawfully to be begotten, and for such uses, intents, and purposes only, and for such estate or estates, either in fee simple, fee tail, general life, lives for years, or other estates whatsoever, either absolute or conditional, and charged with such yearly, or other sum or sums of money, annuities, and rents charge, as the said Rachael Missing, the intended wife of the said Roger Hog, during her coverture with the said Roger Hog, and notwithstanding her coverture, or whether she be sole or married, by any deed or deeds, writing or writings, under her hand and seal, testified by three or more credible witnesses, or by her last will and testament in writing, so attested as aforesaid, shall from time to time direct, limit, nominate, and appoint; and in default of such *direction, limitation, nomination, or appointment, then to the use [*451] and behoof of all and every of the children, if more than one, of the body of the said Rachael Missing by the said Roger Hog, her intended husband, lawfully to be begotten, to be equally divided between them, share and share alike; and for default of such issue, to the use and behoof of the heirs and assigns of the said Rachael Missing, the intended wife of the said Roger Hog, for ever."

By the same deed it was covenanted, "That it shall and may be lawful to and for the said Rachael Missing, from time to time, and at any time or times hereafter, notwithstanding her coverture, by any such deed or deeds, writing or writings, or will, as aforesaid, to make such disposals, appointments, and limitations as aforesaid, of the said premises, or any part thereof."

Lands were purchased and conveyed in pursuance of this covenant, and Mrs. Hog exercised her power to appoint such lands.

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In 1760 Mrs. Hog died. The appellant Rebecca, and the respondent, were two of the children of the marriage.

Previously to Mrs. Hog's death, Roger Hog had purchased an estate in Scotland, and he frequently resided there.

The appellants contended, that at the period of Mrs. Hog's death, Roger Hog was domiciled in Scotland.

The respondent on the other hand contended, that at the period of Mrs. Hog's death, Roger Hog was domiciled in London.

Soon after the marriage of the appellants, Roger Hog advanced Dr. Lashley (the appellant Thomas) 700*l.* on his bond, and settled a sum of 1,300*l.* on Mrs. Lashley and her children. This he did in the form of a bond of provision, declaring this sum, with the 700*l.* formerly advanced, to be "in full contentation and satisfaction to the said Rebecca Hog, my daughter, of all portion natural, legitim, bairns' part of gear, or other claim or demand from me, or from my heirs and executors, in and through my decease, or through the death of Mrs. Rachael Missing deceased, my spouse, excepting goodwill allenarly" (1). In 1779, Mr. Hog advanced the appellants a further sum of 300*l.*; and in 1785, he executed a bond giving to the appellant Rebecca 200*l.*, which with 300*l.* advanced by him in October, 1779, he declared was to make up to Mrs. Lashley an additional portion of 500*l.* This bond also excluded Dr. Lashley's

[*452] *jus mariti*, and declared *that this additional provision should be in full of all legitim, or whatever else she should claim, his goodwill only excepted.

The other children of Mr. Hog received from him certain provisions, which they severally accepted in full satisfaction of all they could demand by and through his decease, or the decease of their mother, in the name of legitim or otherwise.

Roger Hog died on the 19th March, 1789, having previously executed certain deeds of settlement, one of which was a general disposition, dated 5th February, 1787, in favour of the respondent, of all his property, burdened with the payment of debts, legacies, &c.

The appellant Mrs. Lashley, and her husband, upon her father's death, refused to accept the voluntary provisions he had settled on her; and commenced against the respondent an action before the Court of Session, insisting, first, that they were entitled to one-half of the whole personal estate belonging to Mrs. Lashley's father at his decease in name of legitim; her brother and sisters having accepted the provisions made by their father, and discharged

(1) Allenarly = only.

their several claims of legitim: secondly, they contended that she was by the law of Scotland at her mother's death, and as one of her next of kin, entitled to her proportion of one third part of the goods in communion betwixt her father and mother. LASHLEY v. HOG.

By interlocutors of the Court of Session, affirmed in the House of Lords, Mrs. Lashley succeeded in her claim of legitim; and the same was found to extend to her father's property wherever situated [but the Court of Session decided] against Mrs. Lashley's claim to a share of the goods in communion at their mother's decease.

* * * * *

(After various intermediate proceedings Mrs. Lashley and her husband appealed to the House of Lords.)

The ensuing is so much of the order of the House of Lords as relates to the claim of Mrs. Lashley in right of her mother, to a share of her father's moveable estate at the time of her mother's death: [477]

HOUSE OF LORDS, 16 July, 1804.—It is declared, by the Lords spiritual and temporal in Parliament assembled, that the contract of marriage between the late Mr. Roger Hog and his wife, is not so conceived as to bar a claim to legal provisions; and that Roger Hog is to be considered as having his domicile in Scotland at the time of his wife's death; and that the pursuer has therefore a claim in right of her mother, the wife of the said Mr. Roger Hog, who at the time of her death had his domicile in Scotland, to a share of the moveable estate of her father at the time of her mother's death.—Lords' Journal, vol. xliv., page 671. [478]

Lord ELDON, in moving the judgment of the House, [delivered the following judgment]: 1804. *July* 9.

The question whether Mrs. Lashley has under the circumstances [479]
*any claim under her mother, certainly is an extremely important [*480]
question, which, it appears to me, has been hitherto unprejudiced by any direct decision, but, as it seems to me, by no means unaffected by the establishment of principles, which have application to it. It is this, whether, when a person marries in one country, and on that marriage a contract is entered into, but which contract, in the terms of it, has no relation whatever to the personal property of the husband, such as it is at the time of the marriage, such as it shall be subsequent to the time of the marriage, or such as it may be at the death of the husband; whether, because, in fact, the

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marriage took place in England, whatever may be the change of domicil of the husband subsequent to the marriage, and whatever shall be said to be in law the place of his domicil at the time of his death; the administration of his estate in that place, where he dies domiciled, is to be an administration as far as it respects his wife, with reference, not to the law of the place where he died domiciled, but to the law of the place where the marriage was had; and then stating that, whatever might have been her claims if she had been married in the place where her husband died, let her husband die domiciled where he may, she neither has, nor can have, any other rights than those, which she would have had, if the husband had died domiciled in the place where the marriage was entered into. This question comes to be important, because your Lordships will observe that there is a great difference, particularly in this case, which is the case of a predeceasing wife, between the claims of her children, and what would be the claims of her children, if the rights of the mother are to be determined upon by the law of Scotland, or by the law of England. Under the law of England, I need not state to your Lordships that, where the wife predeceases the husband, and there has been no convention or provision upon her marriage; when she dies, instead of anybody representing her having any claim as against the husband, her husband has a title to be her universal representative against any children she had, and all other persons in the world. The law of Scotland is not so, because that law recognises what is called the communion of goods in the married state, and by virtue of that law the wife has certain interests, if she predeceases the husband; she and her husband being considered as entitled, in communion and society, in the personal estate, and the society and communion expiring by the dissolution of the marriage: in consequence of her death, the property comes to be *severed, and her children, as her children, have a right to a part of the property of the husband, as representing her, against the husband himself. The proportion, in the case of the wife dying after her husband, seems to be pretty much the same as in the law of England; if he predeceases her in England, dying intestate, leaving children, your Lordships know her share is one third, and the children have the other two thirds; if there are no children, her portion is a moiety; and the next of kin, not standing in the condition of children, take the other moiety. So, in the law of Scotland, her right is different, in respect to the proportion or extent of her claim, in respect of her husband's dying with children,

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or without children. I think, if he dies with children, she is entitled to a third, and to a moiety if he dies without children. In order, therefore, to state this question to your Lordships, we must consider, first, what would be the case supposing the wife had died after the husband; and see how far the principles we shall establish to regulate that case, will apply to the case of the wife predeceasing her husband. When it was stated, at the Bar here, that the *locus contractus matrimonii* must govern, one's attention was naturally called to the consideration of all the difficulties that presented themselves, as consequential upon that way of stating the proposition. I am ready to admit, there are considerable difficulties upon any state of the proposition; and yet, to a mind informed as that of an English lawyer is, as he is informed by his habits, I owe it appears to me one of the most extraordinary propositions I have ever heard, notwithstanding the passages that are found in text writers upon the subject, that it could be maintained, as an universal proposition *at least, that the *locus contractus matrimonii* was to [*482] govern. It is, no doubt, one question, what is an universal proposition to be acted upon in England, Scotland, or anywhere else, as a principle of sound law, to be adopted every where. And another thing to say, what is to be considered as being the law of England upon the point. When one recollects what has been the universal practice in regard to the administration, in this country, of the effects of intestates, under all the circumstances which have obtained, under all the changes and mutations of instruments which parties make in their lifetime, I believe it never occurred to any persons who have sat in those Courts, in which they administer the estates and effects of intestates, to think of the question, Where was the party married? in order to decide what was the share a wife was to take of her husband's personalty. This is very familiar to us in this country, because your Lordships know very well that the distribution of the personal estate of intestates is in different proportions in different parts of England: where a person's estate, for instance, is to be distributed as the personal estate of an individual living in that district in which the custom of the province of York obtains, the wife is there entitled to five ninths: and if the *locus contractus matrimonii* is to determine upon her rights, where there is no domicile in the province, I believe I should state a doctrine that would extremely surprise all those inhabitants of London, who have transplanted themselves from the parts to which I am now alluding, if I were to tell them, if they happened to die

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domiciled in the province of Canterbury, where the wife's share is one third, that it was not the circumstance of being themselves domiciled within the province of Canterbury, which was to regulate this; but that the circumstance that the marriage had been had in that part of this kingdom on which the custom of the province of York attaches, was to decide upon it; and that it was to decide upon it with no communication, and no agreement between the parties at the time of the marriage. Upon this doctrine the result would be, that if a man domiciled within the province of Canterbury, should, in taking a journey northward, marry a lady within the province of York, though they went immediately home, and resided during the rest of their lives within the province of Canterbury, the wife would be entitled to five ninths of the personal estate. Taking it the other

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way, we know there are persons who come from that part *of the world to which the custom of the province of York extends: they happen, perhaps, not to think much about these things; in advanced life they are likely to go home again, and they take their chance. They are husband and wife, in this respect as in all others, for better and for worse; and I should conceive it to be quite clear law (though it seems to have puzzled some very learned persons in the statement of these cases) that a man might come from a particular part of the north of England and marry in the north of England, where, if he had died before he accomplished his purpose of taking his journey, his lady would unquestionably receive five ninths of the personal estate: if he came up to London to better his fortune (as we north-country people are apt to do), and died in London, his wife would take her one third according to the custom of the province of Canterbury; and if in his old age he had retired to the land of his nativity, and died intestate, the lady there, who, in the first instance, would be entitled to five ninths, who had by the course of events lost that right, and become entitled in the second instance to only one third, when her husband returned again to the province of York, dying in the place in which he was born and married, would be restored again to the five ninths; her condition as a wife and her right as a wife being altered from time to time exactly as her person followed her husband's person from one place of domicil into another place of domicil, till it was at last decided, by his death, where he left his residence in this world. I take that to be quite clear law. I think it was as long ago as 1704, unless I mistake the import of the case, that, as amongst French people, the law of England had decided this; for,

in the case of *Foubert* v. *Trust* (1) this case occurred: A French lady and gentleman married at Paris; and, having married there, there was a written agreement, by which certain sums of money were disposed of; and, with respect to the other property which the parties had or should acquire, that was by this agreement, according to the construction put upon it in our Courts, to go according to the custom of Paris. After the marriage was had, the lady and gentleman thought London was a better place to reside in than Paris, and came here. They lived here some years: at length the wife died, and the question arose upon her death, how the property was to be distributed. It first came on in the Court of Chancery. The LORD CHANCELLOR was of opinion (2), that it was *not the intent of that [*484] agreement to attach, under all the circumstances, the rule which the custom of Paris afforded as to the distribution of the property; and he held that, the parties being domiciled in this country, the law of this country must decide the right to his share in his wife's property. That was afterwards reversed in this House. But upon what principle was it afterwards reversed in this House? Why, upon a principle which showed what the conception of this House was as to the law, if there had been no rule for the application of that principle; for it is distinctly admitted, in the printed reasons by the counsel on both sides, but especially in the printed reasons, by the gentleman who was of counsel for the husband, that, though the parties married in Paris, the custom of Paris would not follow them; and the ground upon which the LORD CHANCELLOR's decree was taken to be wrong was this (and an extremely clear ground it is), that there the parties had in Paris come to a written agreement, the true construction of which written agreement was, that, wherever the parties died, the custom of Paris should regulate the distribution; therefore, said this House, it is not the regard which the law here administering property has to the custom of Paris, but the rule is founded in the contract which the parties themselves had entered into; and that contract, which they there entered into, will travel with them, though the custom will not follow them. The contract will attach upon the property after the death of the parties. The meaning of the parties was, that it should so attach upon the property after death; and there can be no reason in the world why the parties should not say, by express contract, that the *locus contractus matrimonii* should decide. They may do so if they

(1) 1 Br. P. C. 129 (*Feaubert* v. *Trust*, *S. C.* Prec. in Ch. 207).

(2) The cause was heard by Lord Keeper Wright, in 1702.

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please, in a written agreement, which shall describe what shall be the share of the wife in the property of her husband, when he is dead. It seems to me, also, that that case was recognised to be very good law in a subsequent case, *Freemoult* v. *Dedire* (1). The result of the case may be stated to show this, that it was the opinion of the Court, at that day, that, where the marriage had been had in Holland, the distribution in this country, if the party died domiciled in this country, would be certainly according to the law of Holland, if you showed there were articles saying the distribution should be according to the law of Holland. But they seem to have refused,

[*485] in that case, to make the distribution according to the law of *Holland, because it had been proved as a fact in the cause, what was the law of Holland, which those articles had stipulated between the parties should furnish the rule of distribution. Your Lordships have already gone the length of deciding, in the former stages of this cause, that, with respect to the children's shares upon the death of the father, it is *locus domicilii*, at the death of the father, that must decide what they are to take. In this case, the marriage was had in England. Some of the children were, I believe, born in England; and Mr. Hog having altered his domicil, and dying domiciled in Scotland, your Lordships held, that, because they were the children of a father domiciled in Scotland, notwithstanding that was not the *locus contractus matrimonii*, the law of Scotland must decide upon the rights of those children. I believe it would be next to impossible to say, that there is any distinction to be made between legitim of the children, as taking by such succession, and the *jus relictæ* of the widow as taking by the same. It would be absolutely impossible, if the wife survived the husband, that you would say, that, though the marriage was in England, the children of that marriage should take according to the law of Scotland, where the man was domiciled; but that the wife should take according to the law of England, where the man was married. Unless you could say, in the case of the wife surviving the husband, that her interest was to be decided by the law of England, where the marriage was had, although the right of the children, who, in a sort, derived their title under that marriage, depended on the law of Scotland, that is, that the surviving wife took according to the *locus contractus matrimonii*, and the children according to the *locus domicilii*, it would be difficult to distinguish between what the wife takes in the

(1) 1 P. Wms. 429.

character of wife, if she happens to die in the lifetime of her husband, and what she takes in the same character, and under the same title, if she happens to survive the husband. It seems to me, therefore, when a distinction is taken between the legitim and the *jus relictæ*, in the manner in which it has been taken in this case, that the distinction is not substantial enough to be acted upon. A vast number of ingenious difficulties have been stated upon this subject, which may deserve a great deal of consideration; but one may here lay out of consideration all those cases upon which it has been asked,—What are to be the consequences if a *man marries in one place and goes immediately [*486] to dwell in another? If any persons were to go into Scotland, get married at Gretna Green, or anywhere else, and come back to England; or if they came from Scotland and were married in England; in the one case, if the parties returned immediately, and became domiciled in England; or, in the other case, if the parties returned, and became domiciled in Scotland; in both these cases the place of marriage is a mere incident in the form of the contract, and would not alter the law, which says, that the place where the parties *bonâ fide* reside, and that I shall call the *bonâ fide* residence of the husband, will decide upon the rights both of the wife and the children. But it is said, that, if there be no express contract when the marriage is entered into, there must be an implied contract, and it is assumed that that implied contract is this,—that the distribution which the law would make of the property of the husband, if he were to die *eo instanti* that the marriage was celebrated, is the distribution which must be made of the property of the husband dying intestate at any distance of time from the period when the marriage was contracted, and under all the circumstances of mutation and change, which might have taken place. It appears to me, that those who say, that there is such an implied contract, beg the whole question, because the question is, whether the implied contract is not precisely the contrary. This being a contract attaching upon property in consequence of its being personal estate, whether the true implied contract must not be taken to be that the condition of the wife, in respect to her expectations, should change as the condition of the husband changes, with reference to the law of the country in which they are resident. Cases of great hardship may be put with respect to Scotch and English ladies. They tell you, with reference to a marriage in England, the moment the husband contracts that marriage, all the

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debts due to the wife, and property in the wife, attached to him; but that in the case of a marriage in Scotland, with respect to all the debts due to the wife, the husband must take the trouble of taking his hat off, to request the payment of that money from those from whom it is due to her, before he vests a right to it in himself. But, really, the difference is not very considerable, because, although it be that the husband, if he happens to die, without having done any act to stamp the character of his own peculiar ownership upon the property of his wife, is taken to have chosen to let it go to the wife, because he chooses to forbear to take that which previously *to the connection was hers; yet on the other hand, there is nothing more clear, than that the law supposes he may receive it when he pleases; for a man cannot, without evidence, be supposed to forego that which he takes in right of his wife: he may assign it for valuable considerations, or he may make it his own to all intents and purposes; and the moment he chooses so to make it his own, he may assign it to persons in trust for the wife, who may have, in this country, the special equity of claiming to have some provision made out of it for herself. But the true question is, whether it is not of necessity that the husband and the wife, or the one of them, and if the one of them, which of them, is to determine in what manner, and in what place, the husband is to struggle for the means of provision for himself and his family whilst he lives, and for all the means of provisions for the family he shall leave behind him after he is dead. And when you say that, both in England and in Scotland (about which there can be no doubt), it is competent for the husband to spend every shilling of the property, to alien *bonâ fide* every shilling of the property; what does that amount to but this, that the husband, if he pleases, has it in his power to make it of as little consequence to both his wife and children in what country they resided at his death, as if they were in no country at all? The true point seems to be this,—whether there is any thing irrational in saying that as the husband, during the whole of his life, has the absolute disposition over the property; that as to him the policy of the law has given the direction of the family as to the place of residence; that as he has therefore this species of command over his own actions, and over the actions of the family, and property which is his own, and which is to remain his own, or to become that of his family, according to his will; why should it be thought an unreasonable thing that, where there is no express contract the

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implied contract shall be taken to be, that the wife is to look to the law of the country where the husband dies, for the rights she is to enjoy, in case the husband thinks proper to die intestate? This has been the principle, which, it seems to me, has been adopted, as far as we can collect what has been the principle adopted, in cases in those parts of the island with which we are best acquainted; and, not being aware that there has been any decision which will countervail this,—thinking that it squares infinitely better with those principles upon which your Lordships have already decided in this case,—it does appear to me, attending to the different sentiments to be found in the *text writers upon the subject, that [*488] it is more consonant to our own laws, and more consonant to the general principle, to say that the implied contract is, that the rights of the wife shall shift with the change of residence of the wife, that change of residence being accomplished by the will of the husband, whom, by the marriage contract, in this instance, she is bound to obey. Is there any inconvenience in this? None in the world; because it is an equally acknowledged principle, that, though the custom of the place may not follow the parties of this contract, which places them in the relation of husband and wife and children, yet it is undeniable law, that they may contract under hand and seal that the custom of the place shall follow them. Whether it will be convenient, in ninety-nine cases out of a hundred, that there should be such a convention and such a contract; or whether it will not be mightily inconvenient to the affairs of families to form such a contract or convention; is a question which persons viewing it may think very differently about; but if there be any inconvenience in the circumstance of such a convention not being formed upon the marriage, it is an inconvenience neither of a higher nor less nature than any other, which attaches upon that relation, which is to be left to the providence of parties when they enter into that relation; but which can be met by the providence of parties when they enter into that relation, and to which inconvenience they expose themselves if they do not think proper at the time to provide against it. It may be said, in this case, and truly may be said, in ninety-nine cases out of a hundred of a similar sort, if they arise, that this is a surprise upon the parties. The true answer to that is, that I believe the parties never thought of it; when they entered into this marriage they entered into no contract by which this lady was to take one penny of the husband's property; but they entered into a contract by which she was to

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have somewhat more than two thirds of her own property converted into land, with a power to her to give this to any of her children that deserved best of her: they could not but have considered that Mr. Hog must die somewhere; that he was likely to die in England; but there is no stipulation that she shall have one shilling left to her: she takes her chance, under the effect of the marriage, whether she shall, or shall not, receive anything, even upon the casualty of the husband dying intestate. If he had thought proper to lay out all his money upon land, and had taken the caution to lay it out in the name of a trustee, instead of in his own name, she

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*would not have what the Scotch call terce, and we call dower; on the other hand, if Mr. Hog had that, which it appears he had for a great number of years, a very strong inclination and a fixed purpose to reside in Scotland, where he was born, and to die there, one should think, if he thought proper to attend to this subject with caution, he would have asked what would be the state of his wife if he did die there. But the truth is, that parties do not think upon this subject when they enter into these contracts; they get a bit of a settlement made, and very important interests remain unattended to. But I think it appears that this claim could not be matter of much surprise, when your Lordships come to see how this matter was regarded by men of business in Scotland; because, though this lady died in 1760, and though Mr. Hog unquestionably became afterwards a domiciled Scotchman, having realized property in land in that country, whenever provisions were tendered to the other children, or to the appellant herself, your Lordships observe the persons who drew those instruments thought there might be at least some colour of claim under their mother's decease; and that circumstance, that there might be that colour of claim, whilst it contains an intimation upon the point at law, that at least it was doubted by the lawyers in Scotland whether this might not be supported, is also a material circumstance, in another respect, that it contains a strong intimation as to what they believed to be the fact, with the respect to the domicile of the father at the decease of the mother. Without entering, therefore, into a great variety of very nice cases, which might be put, and which might be all reasoned down, in my apprehension, to the single question,—Which is the principle that you are to imply from the contract of marriage; whether is it to be considered that the rights of the wife must vary with the rights which attach upon her residence in different places, and that her right to succeed to her husband must depend upon

the domicile which he had at the time of her death, if she is dead, or at the time of his death, if she survived him: or, on the other hand, that the *locus contractus matrimonii* is to regulate the distribution of the property, and, through all the changes in future life, her right is to remain unaltered in a case in which there is no express contract at all ?—it does appear to me that the rule we have adopted in this country is the better rule; and therefore I shall presume upon that part of the case, in the application of that principle, to submit to your Lordships the propriety of altering the interlocutors, so far as they deny Mrs. Hog's right to transmit to her next of kin, she predeceasing *her husband, the usual share [*490] in the goods of that husband.

EARL OF ROSSLYN:

1804. *July* 10.

I am sorry to observe that, in the proceedings of the Court below, there have occurred, in my opinion, several mistakes in point of law, particularly in that interlocutor which finds that the circumstance of the marriage being celebrated in England can decide upon the rights of succession that will arise to the wife and children of that marriage, in opposition to that law which, by the future events of the life of the party, may be the law of the land, to operate upon his property at the time of his death. I think there are many errors that have misled the judgment of the Court upon this point. In the first place, in this case there is an express contract,—and I have no conception, in point of law, that a lawyer is in such case to entertain a metaphysical idea of an implied contract arising from the situation in which the parties placed themselves by a civil act. My general idea of law is, that in all cases where the parties make an express contract, that includes all consideration of an implied contract: an idea of an implied contract, in all cases where there is an express contract, is to me a solecism. But, supposing there had been no legal contract, and you were to determine upon the situation of the parties upon the mere fact of a marriage celebrated in a given place, they had no occasion to raise an implied contract: a man and a woman are united together; they take their chance of the future fortunes of each other, and particularly with regard to the wife, who may have no domicile separate from the domicile of her husband: she must follow the *fortunes of her husband, wherever they happen to be [*491] placed, and must take her chance at the time when his fortune falls under the disposition of a particular law; therefore, in the

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general case, there is no foundation for that, (and I am sure my noble and learned friend will see the application of this observation in almost every case where that occurs,) that a metaphysical idea of an implied contract is a fallacious idea, substituting an imaginary idea, not applicable to the actual situation and relation of the parties. With respect to the claim of the appellant in right of the mother to that share of the estate which the law of Scotland gives under the name, not very properly applied, of *jus relictæ*, I am of opinion, with the noble and learned lord, that the interlocutor ought to be reversed.

1846. *Dec.* 14, 17, 23.

Rolls Court.

Lord LANGDALE, M.R.

[1]

COLMAN *v.* THE EASTERN COUNTIES RAILWAY COMPANY (1).

(10 Beav. 1—19; S. C. 4 Rail. Cas. 513; 16 L. J. Ch. 73; 11 Jur. 74.)

Observations as to the extent of the powers given by Railway Acts.

The Directors of a Railway Company, for the purpose of increasing the traffic, proposed to guarantee certain profits, and secure the capital of an intended Steam-Packet Company, who were to act in connection with the railway.

Held, first, that such a transaction was not within their powers, and they were restrained by injunction.

Held, secondly, that in such a case, one of the shareholders in the Railway Company was entitled to sue, "on behalf of himself and all the other shareholders, except the Directors," who were defendants, although some of the shareholders had taken shares in the Steam-Packet Company.

A plaintiff filed a bill on behalf of himself and other shareholders in a Railway Company, to restrain the Directors committing a breach of trust. It appeared that he was suing at the instigation of another rival Company. Held, that this circumstance was not, of itself, sufficient to prevent him obtaining a special injunction on the merits of his case.

THIS was a motion to dissolve a special injunction under the following circumstances:

Under the powers contained in their Acts of Parliament (2), the [*2] Eastern Counties Railway Company and *the Eastern Union Railway Company had formed a railroad from London to Manningtree, a place within ten miles of the port of Harwich. The Directors of these Companies conceived that it would add to the traffic and profits of the railway, if a Steam-Packet Company could be formed, communicating between Harwich and the northern ports

(1) *Att.-Gen.* v. *G. E. R. Co.* (1880) 5 App. Cas. 473, 49 L. J. Ch. 545, 42 L. T. 810; *Foster* v. *L. C. & D. Ry.* [1895] 1 Q. B. 711, 64 L. J. Q. B. 65, 71 L. T. 855.—C. A.

(2) 6 & 7 Will. IV. c. cvi., local and personal.

of Europe, and they accordingly took proceedings for the establishment of such a Company.

A prospectus was issued, and a deed of settlement prepared, whereby it was proposed, that the shares in the projected Company, called "The Harwich Steam-Packet Company," should be offered to the shareholders in the above-mentioned Railway Companies.

The Railway Companies intended to guarantee to the shareholders in the Steam-Packet Company a dividend of 5 per cent. per annum, upon their paid up capital, until the dissolution of the Steam-Packet Company; and that, upon the dissolution, the whole paid up capital should be paid by the Railway Companies to the shareholders of the Steam-Packet Company, in exchange for a transfer of their assets and property.

The plaintiff, a shareholder in the Eastern Counties Railway Company, objected to this, and to prevent it, he instituted this suit, on behalf of himself, and all other proprietors of shares in that Company (except the defendants) who should come in and contribute to the expenses of this suit, against the Company and all the Directors.

The bill, after alleging a case to the above effect, stated, that in October, 1846, the plaintiff called upon the Secretary to enquire into the nature of the arrangement between the Companies, and was informed that *the proposed arrangement was of this nature: [*3] that passengers should be conveyed from London to Rotterdam, &c. for certain fixed fares, and that if it should be found necessary that the whole of those fares should be paid over to the Steam-Packet Company, in order to declare a dividend of 5 per cent., the Railway Company would pay the whole amount received for the fares to the Steam-Packet Company.

The bill also stated, that many of the proprietors of shares in the Eastern Counties Railway Company had declined to take any share in the Steam-Packet Company, and had altogether disapproved of the proposed arrangement between the Railway Company and the Steam-Packet Company; but that several proprietors of shares in the Eastern Counties Railway Company, upon the faith of the proposed guarantee, had accepted the shares allotted to them, and had paid the deposits thereon.

The bill stated, that no contract or agreement had at present been entered into with the Harwich Steam-Packet Company, under the common seal of the Eastern Counties Railway Company, or in

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any other manner, sufficient to render an agreement or contract legally binding upon the said Railway Companies.

The bill prayed a declaration, that it would be a breach of trust on the part of the Directors of the Eastern Counties Railway Company to enter into any contract, &c., on behalf of the Eastern Counties Railway Company to guarantee to the Harwich Steam-Packet Company any dividend on their capital, or the repayment of the said capital in case of the dissolution of the Steam-Packet Company, or to apply any funds of the Railway Company in making any payment to the Steam-Packet Company, for any of the [*4] *purposes aforesaid; and that it might also be declared, that the Directors of the Railway Company were not authorised to make any reduction from their usual tolls, &c., in favour of any persons or goods conveyed to or from Harwich by any steam packet belonging to the said Steam-Packet Company; and that the Directors of the Eastern Counties Railway Company might be restrained by injunction from entering into such proposed arrangement, or any such contract, agreement, or undertaking as aforesaid, &c.

On the 19th of November, 1846, a special injunction was granted *ex parte*, by the MASTER OF THE ROLLS, to restrain the defendants, the Directors, until the 26th of November, from entering into the proposed arrangement with the Steam-Packet Company, or any such contract, agreement, or undertaking as was mentioned in the bill.

This injunction was afterwards continued till the 14th of December, when the case was argued before the Master of the Rolls, upon a motion and a cross-motion: the defendants moving to dissolve the injunction, and the plaintiff moving to continue it.

In support of the motion to dissolve the injunction, an affidavit was sworn by Mr. Roney, the Secretary of the Eastern Counties Railway Company, stating, that it was the general practice for Railway Companies to agree with the proprietors of coaches, omnibuses, and other vehicles for the conveyance of passengers and goods between the various stations on the railways and adjoining places, with a view to increase the traffic on the railways, and that the Railway Companies usually guaranteed to the proprietors of the coaches or omnibuses a percentage of at least 5*l.* per [*5] cent., and indemnified them *against loss in the use of their vehicles; that he believed the proposed arrangement with the Harwich Steam-Packet Company would be very beneficial to the

Railway Company; that the arrangement had not been agreed to by the shareholders in the Railway Company, nor had it been discussed at any meeting of their shareholders called for that purpose; and that there were more than 8,000 shareholders in the Eastern Counties Railway Company.

He further stated that the plaintiff was a wharfinger, and in that capacity was an agent of the General Steam Navigation Company, and that his solicitors in this suit were the solicitors of that Company; and that the deponent believed, that the bill had been filed and the injunction obtained, at the instigation and request of the General Steam Navigation Company, who feared that their interests would be injuriously affected by the establishment of the Harwich Steam-Packet Company, and not for the purpose of protecting the interests of the shareholders in the Railway Company; that a special general meeting of the shareholders in the Eastern Counties Railway Company had been held on the 12th of November, 1846, and that the Chairman of the Company had then stated, that nothing would be done to bind the shareholders of the Railway Company to any arrangement with the Steam-Packet Company, until such arrangement should have been approved at a special general meeting convened for that purpose; and that the Directors had not, nor ever had, any intention of entering into any such contract without the sanction of their shareholders. This affidavit was not contradicted.

Mr. Kindersley and *Mr. Grove*, on behalf of the defendants, resisted the injunction on three grounds: *first, on the merits; [*6] secondly, because the bill was not properly framed; and, thirdly, on the ground that the plaintiff, having lent himself to the views of a rival Company, was under a personal disability. * * *

Mr. Turner, *Mr. Roupell*, and *Mr. Twells* for the plaintiff: [9]

* * The powers given by the Legislature to Companies, are [11] given between the public and the Company; and Lord COTTENHAM has, on several occasions, stated, that such Companies are to be strictly confined to the powers thus given them by their Acts. It is therefore incumbent on the defendants to show, that their Act gives them either express or implied powers of carrying into effect their projected arrangement. Express power they have none; and the special powers given by the 208th section to contract with other railways, excludes the notion that more extensive powers are to be

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implied. Again, the 186th section expressly prohibits them from making any reduction either directly or indirectly, partially or in favour of any particular person or Company; and this is what is proposed. It would be contrary to the policy of the law to allow extensive powers given to combinations of numerous individuals and great capital for certain purposes, to be diverted, without the sanction of the Legislature, towards a perfectly different object.

Secondly. The pleadings in this cause are properly framed. It is not necessary to make all the shareholders parties in such a case as this: [*Richardson* v. *Hastings* (1); *Wallworth* v. *Holt* (2)]. One proprietor may sue on behalf, &c., to recover back monies wrongfully diverted from the partnership (3), it must be equally competent for one to sue, in the same form, to prevent its improper application. The Directors sufficiently represent the dissentients.

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Thirdly. It is said that the plaintiff sues at the instigation of the General Steam Navigation Company; but the Court looks to the rights and not to the motives of parties; and there is no allegation that he is not suing for his own benefit. Though he may be instigated by others to assert his right, and being unable, with his individual means, to do so against so powerful a body as a Railway Company, be availing himself of their assistance, still that furnishes no reason for depriving him of his rights, or for placing him beyond the protection of the law.

Mr. Kindersley, in reply.

Dec. 17

THE MASTER OF THE ROLLS:

This is a motion to dissolve an *ex parte* injunction, restraining the defendants from entering into a particular agreement with a Company called the Harwich Steam-Packet Company.

Three reasons have been offered for dissolving the injunction. One is personal to the plaintiff: and as to this, I am of opinion, looking at the affidavit of Mr. Roney, that there is not sufficient ground to say that the plaintiff has not a right to sue and ask for an injunction, if the merits of his case entitle him to one.

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The next objection is as to the form of the pleadings; and I do not think I should be right in coming to a conclusion upon it, without carefully examining the frame of the record.

The third ground is upon the merits; and I think, after the full

(1) 64 R. R. 36 (7 Beav. 323).
(2) 48 R. R. 187 (4 My. & Cr. p. 635.)
(3) See *Hichens* v. *Congreve*, 32 R. R. 173 (4 Russ. 562).

discussion the matter has undergone, and considering the great and extensive importance of the principle involved in it, that I ought not to abstain from at once giving my opinion upon the point.

There are four parties to be considered: the plaintiff, the defendants the Eastern Counties Railway Company, the Eastern Union Railway Company, and a Company, or proposed Company, called the Harwich Steam-Packet Company. The plaintiff is a shareholder in the Eastern Counties Railway Company, and has no interest whatever except in that Company, and he is exposed to no liability except such as may be incurred in properly carrying on the business of that Company.

I think it right to observe, that Companies of this kind, possessing most extensive powers, have so recently been introduced into this country, that neither the Legislature nor courts of justice have been yet able to understand all the different lights in which their transactions ought properly to be viewed. We must, however, adhere to ancient general and settled principles, so far as they can be applied to great combinations and Companies of this kind.

Joint-stock Companies have funds so extremely large, and exercise powers so extensive and so materially affecting the rights and interests of other persons and the *rights which the public or the [*14] subjects of her Majesty have been accustomed to enjoy under the protection of the laws established in this kingdom, that to look upon a Railway Company in the light of a common partnership, and as subject to no greater vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise of interference, not only with the public but with the private rights of all individuals in this realm. We are to look upon those powers as given to them, in consideration of a benefit which, notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole, will be obtained by the public. But it being the interest of the public to protect the private rights of all individuals, and to defend them from all liabilities beyond those necessarily occasioned by the powers given by the several Acts, those powers must always be carefully looked to; and I am clearly of opinion, that the powers which are given by an Act of Parliament, like that now in question, extend no farther than is expressly stated in the Act, or is necessarily and properly required for carrying into effect the undertaking and works which the Act has expressly sanctioned.

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How far those powers, which are necessarily or properly to be exercised for the purposes intended by the Act extend, may very often be a subject of great difficulty. We cannot always ascertain what they are. Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made; but I apprehend, that it has nowhere been stated, that a Railway Company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted, that Railway Companies have no right to enter into new trades or businesses not pointed out by their [*15] Acts; but it has been contended, that they have a right *to pledge, without limit, the funds of the Company for the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. There is, however, no authority for anything of that kind.

It has been stated, that these things, to a small extent, have frequently been done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by the special Acts of Parliament, under which those acts are done, they furnish no authority whatever. To suppose that the acquiescence of railway shareholders, for the last fifteen years, in any transaction conducted by a Railway Company, is any evidence whatever of their having a lawful right to enter into it, is, I think, wholly to forget the sort of frenzy which, during that period, the country has been in. There has been no project, however wild, which has not been encouraged by some one or more of these Companies: there has been no project, however wild, in which the shareholders have not acquiesced, either from cupidity, hoping to gain extraordinary profits, beyond their first anticipations, or from the terror of entering into a contest with a combination of persons so powerful as a Railway Company. I must, in the absence of any legal decision, say, that I consider that the acquiescence of the shareholders in such transactions, affords no ground whatever for the presumption of their legality.

I am far from saying, that that which is here proposed to be done might not be profitable to this Company, or that it might not be a public advantage. I am far from expressing an opinion, that the establishment of a Steam-Packet Company at Harwich, communi- [*16] cating *with this railway, might be not only of public, but of national, importance, or that it might not be proper to give this

Company authority to do that which they are now attempting to do, as it seems to me, without authority: I mean to express no opinion as to this.

What they are doing is this: under the powers of this Act of Parliament enabling them to do what is required, for the construction, maintenance, and proper and convenient use of this railway, they are proposing to pledge the funds of this Company, to support the proposed Harwich Steam-Packet Company, to the extent of 150,000*l.* or even 300,000*l.* The agreement is of this nature: a proposition is made to certain individuals, to establish a Steam-Packet Company from Harwich to the northern ports, and the Directors say, we will do all that we can to encourage the shareholders in the Railway Company to become shareholders in the Steam-Packet Company. This might be a very legitimate and proper mode of encouragement, because it would be done at the expense and risk of each individual, who makes his own choice, whether he will incur any liability. But besides this, the Directors of the Railway Company propose, whatever may be the success of the Steam-Packet Company, and even if it should fail, to secure to the subscribers to the Steam-Packet Company interest to the extent of 5*l.* per cent. upon the capital out of the funds of the Railway Company; and, moreover, if the Steam-Packet Company should fail altogether, so that it would be proper to put an end to it, the Directors of the Railway Company propose,—that the funds of the Railway Company shall be pledged to pay back to every subscriber to the Steam-Boat Company the full amount of his subscription.

It is not proposed that the Railway Company should directly, and by their own Directors, engage in the *Steam-Packet Company, [*17] and carry on that trade; but only that they should impose on the Railway Company, the whole risk and liability not only of paying interest at the rate of 5*l.* per cent., but if the transaction should turn out an unprofitable one, of making good to every shareholder the full amount which he has paid. Is there any thing in this Act of Parliament sanctioning such a course of proceeding? Do the powers to construct, maintain, regulate the traffic, and to do all that is necessary for the purpose of carrying on and working the railroad, imply that the Directors are to be at liberty to pledge the funds of the Company for a completely different transaction, in the hope that it may turn out a profitable one, and by being itself profitable, add to the profits of the Railway Company? Surely

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there is nothing in the powers given by this Act of Parliament which can authorise that.

It has been argued, that I must either allow this to be done, or that I must hold that nothing can be done that is at all out of the express words of the Act of Parliament. Now I shall remain of opinion, until it has been decided otherwise by higher authority, that this is not within the powers given by the Act of Parliament; and when another and a different case is brought before the Court, it will be judged of by the circumstances which attend it. But I must say that, in my opinion, to pledge the funds of this Company for the purpose of supporting another Company engaged in a hazardous speculation, is a thing which, according to the terms of this Act of Parliament, they have not a right to do. At the same time, I am far from saying, that there may not be many small things, perhaps small excesses of authority, which are obviously so beneficial, that the shareholders would all acquiesce in them, and never think of complaining of them. It does not, therefore, follow,

[*18] that they cannot *do the least thing not expressly mentioned in the Act. I believe they have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the Act of Parliament, and they have no power of doing any thing beyond it.

I do not now intend to enter into a discussion of how far such a proceeding is affected by the principles of public policy; but this may be observed, that if there is any one thing more desirable than another, after providing for the safety of all persons travelling upon railways, it is this, that the property of Railway Companies should be itself safe; that a railway investment should not be considered a wild speculation, exposing those engaged in it to all sorts of risks, whether they intended it or not. Considering the vast property which is now invested in railways, and how easily it is transferable, perhaps one of the best things that could happen to them would be, that the investment should be of such a safe nature, that prudent persons might, without improper hazard, invest their monies in it. Quite sure am I, that nothing of that kind can be approached, if Railway Companies should be at liberty to pledge their funds in support of any plausible speculations, not authorised by their legal powers, and which might, very possibly, to say the least, lead to extraordinary losses on the part of the Railway Company.

I repeat, as I said at first, that I consider this to be a question of

great importance, not merely to the Railway Companies who claim these powers, but to the public, in a greater variety of ways than it is necessary for me to point out upon this occasion. I say, therefore, that, subject to the examination which I shall feel it my duty to give to the pleadings, I shall not dissolve *this injunction. If I find that the pleadings are improperly framed, then I think the objection ought to be brought forward in another form, namely, by demurrer.

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The MASTER OF THE ROLLS stated that he had examined the bill, and was of opinion that it had been properly framed, and that the injunction must be continued.

Dec. 23.

WILLES *v.* DOUGLAS (1).

(10 Beav. 47—50; S. C. 11 Jur. 702.)

1840. *Dec.* 3. 1847. *Jan.* 29.

Rolls Court. Lord LANGDALE, M.R.

[47]

Gift in trust to be equally divided between A., B., and C., separate from "their" husbands, and for "their" sole use, and at "their" decease, to be divided amongst "their" daughters: Held, that A., B., and C. each took one-third for life with remainder as to her one-third, to her daughters.

THE testatrix gave the remainder of her funded property, after the legacies were discharged, and at the decease of her sister, to Francis Willes and Charles Johnson, upon the following trusts: "In trust, to be equally divided between my first cousins Mary Johnson, Charlotte Lovell, and Lucy Atty, the interest arising therefrom to be received by the said Francis Willes and Charles Johnson, the trustees for the same, and equally divided, share and share alike, between the said Mary Johnson, Charlotte Lovell, and Lucy Atty, separate from and distinct from their said husbands, and for their sole use; and at their decease, to be divided amongst their daughters."

The testatrix died in 1825; her sister, the tenant for life, died in 1830; Mrs. Johnson died in 1843; and the other two cousins, Mrs. Lovell and Mrs. Atty, were still living.

The three cousins had daughters, all of whom were born in the life of the testatrix.

Upon the death of Mrs. Johnson, a question arose how the fund was to be distributed for the future.

(1) *In re Hutchinson's Trusts* (1882) 21 Ch. D. 811, 51 L. J. Ch. 924, 47 L. T. 573.

WILLES v. DOUGLAS.

Mr. Kindersley and *Mr. Glasse*, for the plaintiffs, the executors.

Mr. Hodgson and *Mr. J. Baily*, for Mrs. Lovell, claimed to be entitled to a moiety of the dividends, on the ground that the interest was, in effect, given to the cousins "equally" as tenants in common, and to the survivors and survivor of them in the
[*48] nature *of cross remainders: *Ashley* v. *Ashley* (1). They argued that, as the fund was to be kept together in the hands of the trustees, in mass, until "their" deaths, that is, of all the cousins, there could be no division until that period. [On this point they also cited *Malcolm* v. *Martin* (2) and *Pearce* v. *Edmeades* (3).]

Mr. Follett, for Mrs. Atty, supported the same construction, and referred to *Tuckerman* v. *Jefferies* (4), where there was a devise
[*49] to Jane and to Elizabeth, "to be equally *divided between them, during their natural lives, and after the deceases of the said Jane and Elizabeth, to the right heirs of Jane for ever." It was held, that Jane and Elizabeth were joint tenants, notwithstanding the words "equally to be divided between them."

Mr. Roupell, *Mr. Willcock*, *Mr. T. H. Hall*, *Mr. Cory*, *Mr. Purvis*, *Mr. Marshall*, *Mr. Borton*, *Mr. Turner*, *Mr. Campbell*, *Mr. Teed*, *Mr. Piggott*, and *Mr. S. James*, commented on the cases cited, and argued that the cousins took as tenants in common for life, with remainder as to one-third, on their respective deaths, to their daughters. They cited *Campbell* v. *Brownrigg* (5), to show that there would be no intestacy in case of there being no daughter of a cousin, but that the shares would go to her representatives.

Mr. J. Baily, in reply.

THE MASTER OF THE ROLLS:

The will is carelessly expressed, but is capable of a rational construction.

It is admitted that the testatrix has, in the first instance, given the property to the three cousins absolutely as tenants in common, but that this absolute interest is afterwards cut down by the subsequent gift to their daughters. It is to be observed, that

(1) 38 R. R. 139 (6 Sim. 358).
(2) 3 Br. C. C. 50.
(3) 51 R. R. 369 (3 Y. & C. (Ex. Eq.) 246).
(4) 4 Bac. Abr. 467.
(5) 65 R. R. 390 (1 Ph. 301).

in this bequest, the testatrix has used the word "their" on four several occasions. She gives this property to these three ladies separate from "their" husbands, for "their" sole use, and at "their" deaths to "their" daughters.

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In the first instance of the use of the word "their," namely, separate from "their" husbands, it clearly means "their several and respective" husbands. It would be absurd to treat the expression as referring to the class of husbands, or to declare that the share of one lady was to be independent of her sisters' husbands.

Again, the property being given to them as tenants in common, the words "for their use" must mean "their respective" use.

Thirdly, "at their decease" cannot mean the cotemporaneous death of all, but the deaths of each respectively.

If this be so, are we to give to the word "their" a different meaning when used on the fourth occasion? I think not, and that the expression "their daughters" means their respective daughters. So that, on the whole, each cousin takes one-third for life, with remainder to her daughters.

DECREE.—"Declare one-third of the funded property of the testatrix is divisible amongst the daughters of Mary Johnson, deceased."

REYNELL *v.* SPRYE (1).

1846. *Dec.* 17.
1848. *Aug.* 5, 7.

Rolls Court.
Lord LANGDALE, M.R.

(10 Beav. 51—57; S. C. 11 Beav. 618—619; 16 L. J. Ch. 117.)

The title of R. to an estate having been discovered by B., R. agreed to give B., a moiety of the estates for his exertions, &c., and B. was to prosecute the claim at his own risk. B., through his solicitor, afterwards took the opinion of counsel upon the case, and instituted a suit of *R.* v. *R.* in the name of R., under a power of attorney given by R. for that purpose: Held, in a suit by R. to set aside the transaction, that B. was bound to produce the opinion, and the documents in *R.* v. *R.* for R.'s inspection, the same not being privileged.

[51]

In the same case, B., wishing to purchase the remaining moiety, procured his solicitor to write him a letter to show to R., and calculated to induce him to sell. R. agreed to sell: Held, in a suit to set aside the sale, that the letter was not a privileged communication.

THIS was a motion for the production of documents.

It appeared, that, in 1843, the defendant Sprye had, by some means or other, discovered that the plaintiff Reynell was entitled

(1) *In re Postlethwaite* (1887) 35 Ch. D. 722, 56 L. J. Ch. 1077, 56 L. T. 733; *The Queen* v. *Cox* (1884) 14 Q. B. D. 153; *Williams* v *Quebrada Railway Land and Copper Co.* [1895] 2 Ch. 751, 65 L. J. Ch. 68, 73 L. T. 397.

REYNELL v. SPRYE.

in reversion to a considerable estate, under the ultimate limitation in a will of a person of the same name. In this matter, Sprye had consulted a solicitor named Young.

A negotiation was entered into between the defendant Sprye and the plaintiff, for imparting the particulars of the discovery, which ended in an agreement between them, that Sprye should have a moiety of the estate recovered, as a remuneration for his exertions and trouble in discovering and investigating the matter; and that Sprye should undertake the risk and expense of the legal proceedings necessary to enforce the plaintiff's rights. This arrangement was assented to on the 2nd of June, 1843, and on the 18th of June the opinion of counsel was taken by Young, which was favourable to the plaintiff's claim.

The arrangement was carried into effect by four instruments, dated in July, 1843, and prepared by Young. The first was a power of attorney from the plaintiff to Sprye, to commence and prosecute suits concerning the estates in the plaintiff's name.

[*52] The second was a deed *of indemnity from Sprye to the plaintiff, against all costs, &c. incurred in consequence of any suit, &c. commenced in the plaintiff's name, under the power of attorney. The third was a conveyance by the plaintiff to Sprye and his family of a moiety of the estates; and the fourth was a codicil to the plaintiff's will, ratifying the conveyance of the moiety of the estate. Young requested to be furnished with an authority from the plaintiff, "as his solicitor," to take proceedings in reference to the property, but it did not appear that any had been given. Young, however, from the instructions of Sprye acting under the power of attorney, commenced and prosecuted a suit of *Reynell* v. *Reynell*, against the parties in possession in respect of the property.

Sprye afterwards became desirous of purchasing the remaining moiety of the property, and for the purpose of opening the matter to the plaintiff, and to forward his views, Sprye, in April, 1844, wrote to Young the rough sketch of a letter which Young was to write to him Sprye, with a view of showing it to the plaintiff. A letter was accordingly sent, dated the 17th of April, which enlarged on the difficulties of the case, and was intended to induce the plaintiff to come into an arrangement for the sale of the remaining moiety of the property.

Ultimately, in May, 1844, the plaintiff agreed to sell the remaining moiety to Sprye for 5,000*l.*, but the purchase had not been completed, nor the purchase money paid.

In 1846, the tenant for life died without issue. The estate then came into possession, and the plaintiff, having obtained the full benefit of the defendant's knowledge *and exertions, filed this bill against Sprye and Young to set aside the whole transaction, on different allegations of fraud, concealment, and influence, which it is unnecessary to mention. The defendants put in their answers, admitting the possession of various documents; and the question on the present motion was, whether the defendants were bound to produce the case and opinion of counsel of the 18th of June, or the proceedings in the suit of *Reynell* v. *Reynell*, or the letter of the 17th of April, 1844, all of which were admitted to be in their possession. [*53]

Mr. Shapter, in support of the motion, contended, that the defendants were bound to produce the documents in question; that the opinion was taken as much for the benefit of the plaintiff as of Sprye, and that they both had a common interest in it. Secondly, as to the proceedings in the suit of *Reynell* v. *Reynell*, it was the suit of the present plaintiff, and, though conducted at the risk of Sprye, it was prosecuted for the joint benefit of both.

Thirdly, that the letter from Young to Sprye was not privileged, for it did not relate to matters within the ordinary scope of a solicitor's duty: *Carpmael* v. *Powis* (1); that the plaintiff insisted that a fraud had been practised, and that this gentleman had acted not in his quality of solicitor, but as *particeps criminis*.

Mr. Kindersley, for the defendant Sprye, and *Mr. Turner*, for Young:

Young acted on the retainer, and as the solicitor of Sprye alone; and the plaintiff had no right to interfere with him, nor could he have sustained any action against him, if he had been guilty of any negligence in the proceedings in *Reynell* v. *Reynell*. All *communications, therefore, between Sprye and Young are privileged, including the letter in question. The plaintiff says a fraud has been committed; but the truth of that allegation cannot be determined on a motion for the production of papers. [*54]

(THE MASTER OF THE ROLLS: The plaintiff undertakes to show, from the admissions in the answer, that these two defendants were acting in concert together. Surely a solicitor cannot in a case of

(1) 65 R. R. 479 (1 Ph. p. 692).

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fraud protect himself by merely saying that he is an honest solicitor.)

Where an attorney is employed by a client to transact professional business, all the communications which pass between them, in the course and for the purpose of that business, and not those only which relate to litigation commenced or in contemplation, are privileged communications: *Herring* v. *Clobery* (1), *Jones* v. *Pugh* (2). The opinion was taken at the expense and for the purpose of Sprye alone, and is therefore privileged, though no suit was pending.

As to the papers in *Reynell* v. *Reynell*, they are privileged in this suit as well as in the suit of *Reynell* v. *Reynell*. This was decided in *Holmes* v. *Baddeley* (3), on appeal from this Court. *Reynell* v. *Reynell* was the suit of Sprye, though conducted in the name of the plaintiff.

THE MASTER OF THE ROLLS (without hearing a reply) said:

I think the plaintiff is entitled to the production of the case
[*55] and opinion of June, 1843, of the documents in **Reynell* v. *Reynell*, and of the letter of the 17th of April, 1844.

Whatever may be thought of the policy of restricting discovery, yet when a rule is established, it is the ordinary part of my duty to follow it, and if this case came within the authorities cited, however unfortunate the result might be, I should feel myself bound to follow them; but I do not think those authorities apply to this case.

It appears that the defendant Sprye had discovered, by some means or other, that the plaintiff was entitled to rights to some estates, and having made that discovery, he wrote to the plaintiff a letter of the 29th of April, 1843, giving an intimation of those rights, and he proposed to establish them upon the principle of "no success no pay;" that is, if he did not succeed in the establishment of the plaintiff's rights, then he was to receive no benefit for his endeavours to do so. It appears that on the 12th of May, 1843, Young, who is made co-defendant, wrote a letter to Sprye for the purpose of being shown to the plaintiff, confirming the same rule or maxim of "no success no pay," and showing, that the plaintiff's rights were to be prosecuted upon the terms of giving one

(1) 65 R. R. 344 (1 Ph. 91)
(2) 56 R. R. 97 (1 Ph. 96).
(3) 65 R. R. 427 (1 Ph. 476, reversing 6 Beav. 521).

half of the estate to the person who had made the discovery of the plaintiff's right thereto.

The plaintiff consented to this arrangement, and the suit for the recovery of the estate was of course to be prosecuted both for the benefit of the plaintiff and of Sprye, who, it seems, was to have the reward. A case was stated, and counsel was consulted on it. It is said, that this was a case and opinion taken for Sprye alone; but I am of opinion that it was taken for both Sprye and the plaintiff, the one being as much interested in it as the other. The opinion being favourable, the several *instruments were prepared for [*56] carrying this arrangement into effect. First, there was a power of attorney, and, secondly, an indemnity to the plaintiff against the liability to costs of the suit; thirdly, a conveyance of a moiety of the estate was made by the plaintiff; and, lastly, a codicil to his will, to make all sure for the parties. Upon all this being done, a suit was instituted for the recovery of the estate in the name of this plaintiff, but under the arrangement contained in the agreement, and for the benefit of the plaintiff as much as of Sprye. The plaintiff had given an authority to prosecute the suit, and took an indemnity against the liability to costs; but does anybody pretend, that the plaintiff had not a right to know, from time to time, every thing which was done in the suit instituted in his name to enforce his rights, and upon which the whole interest of Sprye was founded. Young was assuming to act under the agreement as the solicitor of the plaintiff; and I am of opinion that the plaintiff had a right both to know what was done in the suit, and to see the documents in that suit. It is quite a different case where a plaintiff is prosecuting a suit for himself.

The only other point raised is with regard to the particular letter. In respect of this what do we find done? Why this: Sprye writes a letter to Young, who acted as the professional adviser of the parties in the suit, and encloses a draft of a letter which was to be written to himself, Sprye, for the purpose of being shown to the plaintiff, and intended to operate as an inducement upon him to execute the conveyance of his interest in the remaining moiety of the estate for 5,000*l.*; and this was ultimately obtained from him. I have no doubt that this is not a letter written in professional confidence for the purpose of obtaining the advantage of professional assistance; for Sprye, *having a particular purpose in view, makes [*57] this gentleman his tool, and not his adviser. I think that that letter is not entitled to any protection whatsoever.

REYNELL v. SPRYE. 1848. *Aug.* 5, 7.

[11 Beav. 618]

Further discovery having been obtained, it appeared, that the defendant Young had in his possession Sprye's draft of the letter of April, 1844, mentioned in the former report, and that Sprye had written a draft of another letter of 12th May, 1843, and sent it to Young, in order that Young, if he concurred, might copy and send it to Sprye, as a letter emanating from Young, with a view to Sprye's forwarding it to Sir Thomas Reynell. This letter was sent by Young to Sprye, and by Sprye to Sir Thomas Reynell, and was mainly instrumental in procuring for Sprye the conveyance of the first moiety of the estate.

The plaintiff now moved for the production of the draft of the letter of April, 1844, the letter of the 12th of May, 1843, the draft of it, the power of attorney of July, 1843, and all the correspondence between Sprye and Young not ordered to be produced on the former occasion.

Mr. Shapter, for the plaintiff, asked for their production, upon the same principle that the letter of April, 1844, had formerly been ordered to be produced. He contended, that it appeared from the concoction of two such material letters, and from the general nature of the case, that Young had acted in a fraudulent and unprofessional manner, and not according to the usual *mode of dealing between solicitor and client. That he had acted as the tool rather than as the solicitor of Sprye; and that, therefore, the plaintiff was entitled to a production not only of the two letters, but of all the correspondence which had passed between Young and Sprye.

[*619]

Mr. Turner and *Mr. Stinton*, for the defendant Sprye, and *Mr. Terrell* for the defendant Young, opposed the production, on the ground that the documents were privileged communications between a solicitor and his client, and they contended, that a mere allegation of fraud was not sufficient to induce the Court to break through the general rule: *Greenough* v. *Gaskell* (1).

They objected, that the plaintiff had amended his bill since the last answer, and therefore, could not now move for production. * * *

Mr. Shapter, in reply. * * *

THE MASTER OF THE ROLLS:

The solicitor acting as *particeps criminis*, and not in the true

(1) 36 R. R. 258 (1 My. & K. 98).

relationship of solicitor and client, is bound to produce the documents concocted between him and his client. That was the ground on which I made the former order. I think the defendant must produce the draft of the letter of April, 1844, and the letter of the 12th of May, 1843, and the power of attorney, but not the other correspondence.

NOTE.—At the hearing of the cause, before Sir J. Wigram, V.-C., in 1849, the transaction was set aside. [See *Reynell* v. *Sprye* (1852) 1 De G. M. & G. 660.]

IN RE HARRISON (1).

1846. *Dec.* 23.
1847. *Jan.* 28.

Rolls Court.
Lord LANGDALE, M.R.

[10 Beav. 57]

(10 Beav. 57—61; S. C. 16 L. J. Ch. 170; 11 Jur. 197.)

As to the legal effect of a payment of a bill of costs "under protest."

A mortgagee's solicitor delivered his bill to the mortgagor nearly three weeks before the day of settlement. At the meeting the bill was objected to; but the solicitor refused to complete without full payment, and the mortgagor paid it under protest: Held, that this was not sufficient to authorize a transaction, although there might be some over-charges.

The taxation of the bill of a mortgagee's solicitor, at the instance of the mortgagor, takes place as between the solicitor and the mortgagee, his client.

THIS was a petition for the taxation of a solicitor's bill which had been paid "under protest."

In February, 1846, an agreement was entered into between the mortgagor (Parlabean) and his mortgagee, that the mortgaged property should be sold and the mortgagor thereby agreed to pay "all usual and fair mortgagee's costs and charges."

The property was accordingly sold; and on the 16th of October, Mr. Harrison, the mortgagee's solicitor, delivered his bill of costs to the mortgagor's solicitors, which amounted to 65*l.* 12*s.* On the 20th of October, the mortgagor's solicitors complained that the bill was "very heavy;" and they stated, that, as their client was only a trustee, there would be no alternative but to tax it for his justification, and that if payment should be insisted on at the time of the completion, "they could only pay the amount in full, upon the understanding that it was paid under protest."

The 5th of November was appointed for the completion of the purchases, on which day another small bill of costs of 8*l.* 8*s.* was

(1) *In re Boycott* (1885) 29 Ch. D. 571, see p. 580; *In re Cheesman* [1891] 2 Ch. 289, 60 L. J. Ch. 714, 64 L. T. 602.

In re HARRISON. [*58]

delivered. The parties met, and *the bill was objected to; but the objectionable items were not pointed out. Mr. Harrison's clerk refused to complete the purchases and hand over the deeds, except on payment of the bills of costs; but he offered to deduct 6*l.* This was refused, and the bills were paid in full, "under protest," and a receipt was given.

This petition for taxation was presented on the 14th of November, and the affidavit made in support of the petition specified a great number of items of alleged over-charges and of improper charges; but the principal objection was, that the greater number of the charges, though maintainable as between the solicitor and his clients, the mortgagees, were not properly chargeable against the mortgagor, or as between mortgagor and mortgagee. The affidavit also stated, that the office of the taxing Masters had been closed for the vacation, except upon vacation references, until the 29th of October.

Mr. Roupell and *Mr. Elmsley*, in support of the petition, argued, that payment had been obtained by "pressure," and had been made "under protest:" that there were over-charges and improper charges in the bill, which could not be sustained as against the mortgagor, and that these circumstances justified a taxation of the bill of costs:

They cited *In re Wells* (1).

Mr. Kindersley and *Mr. Glasse, contrà:*

There has been no pressure in this case: the payment was made voluntarily, after the bill had been delivered three weeks, during which period the petitioner had full opportunity of examining it, and of obtaining an order of course for its *taxation. The "protest" amounts to nothing: a party cannot, upon payment, reserve to himself the right of taxation by protesting, unless there be other circumstances to justify it: and over-charges alone are not sufficient.

[*59]

The taxation, at the instance of a third party, takes place as between the solicitor and his client; and a mortgagor taxing the mortgagee's solicitor's bill places himself in the position of the mortgagee.

THE MASTER OF THE ROLLS:

The petitioner, in common with many other persons, entertains

(1) 68 R. R. 132 (8 Beav. 416).

a notion, that where costs have been paid, it is a very easy thing to undo the transaction, and that nothing more is necessary to be done, than to make "a protest" at the time, and afterwards to discover that there are some over-charges: these two things alone are thought sufficient for the purpose of obtaining a taxation after payment. Now I take leave to say, that a "protest" by itself is of no value. I do not know what it means, except this, that the party paying gives notice, that he will avail himself of every circumstance in the case to enable him afterwards to upset the transaction. This is what it really amounts to, although parties try to give it a larger effect.

Another erroneous notion is, that if a bill, of a greater amount than a solicitor would be allowed on taxation, be paid, and if that payment be accompanied by an intimation of an intention to tax the bill, that this is sufficient to obtain an order for taxation. I take leave to say that this has never been held, and that it has always been considered, that a man may pay to a solicitor more than the legal charges; and, if he do it voluntarily, and without circumstances affecting the solicitor with fraud, or improper conduct, this Court will not afterwards interfere.

This petition is also misconceived in this respect: it proceeds on [60] the notion that a mortgagor, having settled an account with the mortgagee and paid the bill of the mortgagee's solicitor, is entitled, in this jurisdiction by petition, to quarrel with the account so settled, and tax the costs of the solicitor, not as between him and his client the mortgagee, but as between the mortgagor and the mortgagee; and further, that if charges be found in the bill of costs which the mortgagee could not maintain in an account between him and the mortgagor, they are to be disallowed. Such a notion is entirely erroneous, and so much of this petition as depends on this point falls to the ground.

If, in the case of *In re Wells*, which has been referred to, I laid down, as has been supposed, any such proposition as this—that, where a bill has been delivered a full fortnight before the accounts were to be settled, and where every opportunity has been given to examine it (I do not say to tax it, because some difficulty might occur in the vacations), a taxation may be obtained by merely showing over-charges,—if I laid down any such thing,—I think the case was wrongly decided; but if I held, where a bill of costs is delivered at the time of the settlement, and an opportunity to examine is refused, the solicitor saying, "you must either pay it,

In re HARRISON.

or the settlement of the matter for which we have met cannot be completed,"—if I held, I say, that a payment under such circumstances of pressure cannot prevent a taxation, I think the case of *In re Wells* was right, and I will make a like order under like circumstances.

If I rightly understand the facts, this case is reduced to one of simple over-charge, in a bill delivered more than a fortnight before the transaction was completed. If that be so, even if over-charges [*61] do exist, I do not think *it is a proper reason to open the bill, and order a taxation; and this petition must, therefore, be dismissed with costs.

1846.
Nov. 9, 10, 11, 14, 16.

Rolls Court.
Lord LANGDALE, M.R.
Affirmed on Appeal.
Lord COTTENHAM, L.C.

ROBINSON *v.* WALL.

(10 Beav. 61—75; affd. 2 Ph. 372; 16 L. J. Ch. 401; 11 Jur. 577.)

[AFFIRMED on appeal by Lord COTTENHAM, L. C., as reported in 2 Ph. at p. 372, to be inserted in a later volume of the Revised Reports.]

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[61]

1846.
Nov. 19, 20, 23, 25.

Rolls Court.
Lord LANGDALE, M.R.
Affirmed on Appeal.
Lord COTTENHAM, L.C.

HAINES *v.* TAYLOR.

(10 Beav. 75—83; affd. 2 Ph. 209; 11 Jur. 73.)

[AFFIRMED on appeal by Lord COTTENHAM, L. C., as reported in 2 Ph. 209, to be inserted in a later volume of the Revised Reports.]

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[75]

1846.
April 25, 30.
May 1, 2, 4, 5.
Nov. 24.
1847.
Feb. 27.

Affirmed on Appeal.
Lord COTTENHAM, L.C.

FORDYCE *v.* BRIDGES.

(10 Beav. 90—121; S. C. 16 L. J. Ch. 81; 10 Jur. 1020; affd. 2 Ph. 497; 1 Coop. C. C. 326; 17 L. J. Ch. 185.)

[THE decision in this case was varied on appeal by Lord COTTENHAM, L. C., as reported in 2 Ph. at p. 497, to be inserted in a later volume of the Revised Reports.]

[90]

CONOLLY *v.* FARRELL (1).

(10 Beav. 142.)

1846.
Nov. 24.

Rolls Court.
Lord LANGDALE, M.R.
[142]

A contribution was directed amongst specific legatees for payment of the debts and costs of suit. One of such legatees became insolvent, and by his non-payment, the fund raised was deficient. The COURT directed an additional contribution amongst the solvent legatees.

THE testator disposed of nearly the whole of his property in specific legacies, and his general estate proved insufficient to pay his debts. A bill was filed by the executors, for the purpose of compelling a contribution from the specific legatees for the payment of the testator's debts.

At the hearing, the COURT held, that the debts and the costs of the suit, instituted for the protection of the executors and the administration of the estate, ought to be paid out of the specific legacies, and ordered a contribution among the specific legatees for that purpose (2).

The apportioned contributions were paid by all except Mr. Butcher, who became insolvent and unable to pay the amount ordered, and consequently, the fund raised was deficient for the purpose. It was now proposed, that there should be a further contribution among the solvent legatees to raise the deficiency.

Mr. Kindersley and *Mr. Glasse* for the plaintiffs.

Mr. Roupell, *Mr. Willcock*, and *Mr. Tillotson*, for different parties, *contrà*.

The MASTER OF THE ROLLS said, that under the circumstances he must direct an additional contribution.

LANCASTER *v.* EVORS (3).

(10 Beav. 154—168; S. C. 16 L. J. Ch. 8.)

1846.
April 27, 28.
29.
May 1.
Nov. 7.

Rolls Court.
Lord LANGDALE, M.R.
Affirmed on Appeal.
1848.
Feb. 16.

Lord COTTENHAM, L.C.
[154]

An heir buying up incumbrances on the descended estates is entitled, as against the creditors of the estate, to no more than he actually paid.

In 1772, a husband and wife mortgaged their respective estates for securing a debt of the husband. The husband died in 1776, and in 1782 the produce of his estate was brought into Court, and accumulated. The wife died in 1805, and in 1832, the husband's mortgage creditor, neglecting to prosecute his claim against the husband's assets, obtained payment out of the produce of the wife's estate. In 1840, the heir of the husband petitioned for payment out of Court of the accumulated fund arising from

(1) *In re Peerless*, W. N. (1901) p. 151.

(2) 68 R. R. 107 (8 Beav. p. 350).

(3) 55 R. R. 33 (4 Beav. 158).

LANCASTER v. EVORS.

the husband's estate, and a reference was made to ascertain the incumbrances thereon. An unpaid judgment creditor of the wife carried in a claim, which having been disallowed, as founded on a mere equity, he, in 1841, filed a bill against the heir of the husband and the representative of the wife, to establish his claim against the fund: Held, first, that the husband's debt having been paid out of the wife's estate, her estate had a right to be recouped out of the estate of the husband; and, secondly, that the plaintiff's claim was not barred by the Statute of Limitations.

THIS case was argued by *Mr. Purvis* and *Mr. Malins* for the plaintiff.

Mr. Bagshawe for the representatives of John Morgan.

Mr. Turner and *Mr. Smith*, and *Mr. Kindersley* and *Mr. Lovat* for devisees of Evors.

Mr. Rasch and *Mr. Anstey* for other defendants.

Mr. Purvis, in reply.

[*Honner* v. *Morton* (1), *Copis* v. *Middleton* (2) and other cases were cited.]

Nov. 7.

THE MASTER OF THE ROLLS:

The plaintiff in this cause is the legal personal representative of John Burney deceased, who was a judgment creditor of Elizabeth, Lady Pryce deceased. By his bill, he claims to be paid the debt
[*155] due to him out of the *estate of George Arthur Evors deceased, who was, through Diana Evors and Sir Edward Manley Pryce, the heir-at-law of Sir John Powell Pryce deceased, who was the husband of Lady Pryce, and died in her lifetime.

The estates to which the transactions stated in the pleadings of this cause related, consisted of three classes: 1. Estates in Berkshire, which were vested in Lady Pryce in fee simple; 2. Estates in Montgomeryshire, which were vested in Sir John Powell Pryce and Elizabeth his wife, for their joint lives and the life of the survivor of them; and, 3. Estates in Montgomeryshire, which were vested in Sir John Powell Pryce in fee.

In June, 1765, the estates of Lady Pryce were conveyed to Francis Skyrme in trust to sell. In a few days afterwards, they were conveyed by way of mortgage to Barnardiston, to secure to him the repayment of 5,500*l.* and interest. In the following month of January (1766), Skyrme, the trustee for sale, contracted to sell

(1) 27 R. R. 15 (3 Russ. 65). (2) See 29 R. R. 73, *n.* (T. & R. 224).

the same estates to Bagnall for the sum of 9,250*l.* Sir John and Lady Pryce disputed the validity of this contract, and a bill was filed for a specific performance of the contract by Bagnall, who obtained a transfer of Barnardiston's mortgage, and entered into possession of the estate.

At some time not stated, Sir John and Lady Pryce conveyed the estates which were vested in them for their lives as a security for the payment of 1,800*l.* or an annuity of 200*l.*, the title to which became vested in Humphrey Humphreys.

And in August, 1771, Sir John Powell Pryce's fee simple estates were conveyed to Earl Temple, by way of mortgage to secure to him 24,000*l.* and interest.

There being a suit to determine the question as to Bagnall's purchase, it was doubtful whether Sir John and Lady Pryce were entitled to the equity of redemption of Lady Pryce's Berkshire estates, or to the surplus of the purchase-money which Bagnall had agreed to pay for the estate, after satisfying the mortgage which had been assigned to him by Barnardiston. [156]

Sir John Powell Pryce owed 260*l.* to Thomas Jaques, and 240*l.* to Joseph Hughes, and he is said to have borrowed from Jaques and Hughes the sum of 3,000*l.*

And in this state of things, certain indentures, dated the 1st and 2nd days of January, 1772, were executed by and between Sir John Powell Pryce of the first part, Sir John Powell Pryce and Dame Elizabeth his wife of the second part, and Jaques and Hughes of the third part, and thereby, after reciting to the effect I have stated, it was witnessed, that Sir John Powell Pryce and Lady Pryce (in consideration of the premises, and of the further sum of 3,000*l.* to them paid by Jaques and Hughes, and also of the two sums of 260*l.* and 240*l.*, making in the whole 3,500*l.*, the receipt of which was acknowledged), conveyed the estates to Jaques and Hughes, on trust that they, between that time and the 29th of September, 1775, should, out of the rents to be received, improve the estates for the benefit of Sir John Powell and Lady Pryce, pay the interest of the incumbrances, and pay the residue of such rents to Sir John Powell Pryce; and upon the 29th of September, 1775, should sell the estates, and out of the money to arise by the sale should pay and satisfy the charges; viz. the 24,000*l.* and interest due to Earl Temple, the 1,800*l.* or the annuity of 200*l.* payable to Humphrey Humphreys, the mortgage of 5,500*l.* due to Barnardiston, the principal money and interest which would

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[*157] then remain due *to Jaques and Hughes, and such other sums of money as before the sale Jaques and Hughes might, at the request of Sir J. P. Pryce, lend to him, or might, by his order or direction in writing, advance to any other person, together with such expenses and such stipend as therein mentioned. And after such payment, on trust that Jaques and Hughes should, out of the residue of the money, discharge the debts of Sir John Powell Pryce to such of his creditors, as should before the 29th of September, 1775, agree to accept the same after payment of the incumbrances, and agree to stay proceedings for the recovery of their respective debts. And after payment thereof, then in trust, out of the residue of the money, to pay to Lady Pryce, for her separate use, the sum of 5,000*l.*, subject to her own disposition and appointment, and independent of her husband. And it was declared and agreed, that this sum of 5,000*l.* was so secured in lieu and satisfaction of the estate and interest of Lady Pryce in and to part of the estate thereby released, and that she thereby agreed to accept the same accordingly.

In Trinity Term, 1772, Earl Temple filed a bill in this Court against Sir John Powell Pryce and Lady Pryce, Jaques, and Hughes, and other persons, praying payment of his mortgage debt of 24,000*l.* and interest or a sale of the estate; and, by a decree, made on the 17th of February, 1774, it was ordered, that the mortgaged estate, or so much of it as should be required for payment of the mortgage, should be sold, and that if more than sufficient for that purpose should be raised, the surplus was to be paid into Court, with liberty for any of the parties interested to apply. The estates, or some of them, were sold under the decree; and an account appears to have been settled between Sir John Pryce and Lady Pryce and Jaques; but before any report was made,

[*158] the suit *abated by the deaths of Sir John Powell Pryce and of Earl Temple. Sir John died in July, 1776, having made a will, by which he appointed his sister Mary Pryce ah executrix, and leaving his son Sir Edward Manley Pryce his heir-at-law. Earl Temple died in 1779, having made a will, of which he appointed the Marquis of Buckingham executor. The suit having been revived, the Master made his report on the 17th of July, 1782, and it thereby appeared, that, after payment of the mortgage of Earl Temple, there was a surplus of the purchase-money of the mortgaged estates which had been sold, to the amount of 2,821*l.* 11*s.* 1*d.*

Pursuant to an order, dated the 28th of November, 1782, that

sum was brought into Court, and under the decree, any person interested therein was at liberty to apply to the Court.

In January, 1785, Jaques alleged that he was entitled to be paid 1,500*l.* and interest out of the money, and two other persons, namely, Gethyn and Pugh, alleged that they were entitled to be paid certain other sums. Petitions in support of these claims were heard on the 21st of January, 1785; and an order was then made, referring it to the Master to enquire and state what incumbrances there were on the fund, and directing that, in the meantime, the fund should be invested and accumulated. The enquiry directed by the order has never been prosecuted, but the fund was invested, and has been accumulated, and it increased to the amount of more than 20,000*l.* 3 per cent. Consols, and it was part of the estate of Sir John Powell Pryce, who died in 1776.

Sir Edward Manley Pryce, the heir-at-law of Sir John Powell Pryce, devised his real estates to his right heir, who was Diana Evors. She died in June, 1806, *leaving George Arthur Evors, a [*159] defendant to this cause, her heir. There was for some time a doubt whether George Arthur Evors had not an elder brother, who might have been the heir; but Mr. Evors being in possession of the estates, with that doubt respecting the state of his family, bought up several incumbrances thereon, which had been the debts of Sir John Powell Pryce, at low prices.

In the meantime, the bill filed by Bagnall for a specific performance of the agreement which he had entered into with Skyrme for the purchase of Lady Pryce's estate in Berkshire, was dismissed for want of prosecution. Bagnall died in 1804, leaving Lady Scott and Mrs. Winsor his coheirs, and Sir William Scott and Mr. Winsor were his executors. In June, 1804, Burney and Morgan, who were judgment creditors of Lady Pryce to the amount of 1,000*l.* together with Lady Pryce, filed their bill against Sir William and Lady Scott and Mr. and Mrs. Winsor, praying that the contract between Skyrme and Bagnall might be rescinded; but Lady Pryce died in April, 1805; and soon afterwards, Burney and Morgan filed their bill of revivor and supplement against the defendant to the original bill and Sir John Jackson, the devisee and executrix of Lady Pryce, and thereby prayed, that all the debts of Lady Pryce might be paid out of Lady Pryce's Berkshire estate, or the purchase-money payable for the same. By the supplemental matter, the object of the suit was so far altered, that it became a suit for the administration of the estate of Lady Pryce. On

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the 7th day of March, 1814, a decree was pronounced, and thereby it was decreed, that the contract with Bagnall should be performed; and the Master was, amongst other things, to take an account of what was due to the plaintiff Morgan on his securities, and also an account *of what was due to all other the creditors of Lady Pryce, and of all other incumbrances affecting her estate, and enquire into and state the priorities thereof.

[*160]

During the proceedings under this decree, the plaintiffs Burney and Morgan, and the defendant Sir John Jackson died; but the suit was revived after the abatements so occasioned, and the proceedings in the Master's office were continued.

It is now to be stated, that Thomas Jaques (who was party to the deed of January, 1772, and one of the petitioners, who in the suit of *Temple* v. *Pryce* had, in January, 1785, claimed to be paid a debt of 1,500*l.* and interest out of the estate of Sir John Powell Pryce, and who was one of the petitioners, by whom the order of the 21st of January, 1785, had been obtained, and who, under that order, was entitled to go in and establish his claim against the estate of Sir John Powell Pryce), died in the year 1790, having made a will, which was duly proved by John Bowman, one of the executors, alone, and that John Bowman never prosecuted the order of 21st of January, 1785, made in the cause of *Temple* v. *Pryce*; but twenty-five years after the death of his testator, went in under the decree made in the cause of *Burney* v. *Scott*, and claimed to be entitled to payment of the sum of 1,500*l.* out of the estate of Lady Pryce. And the Master, by his report in that suit, dated the 8th day of August, 1831, found, that there was in Court, in respect of the purchase-money of the estate therein mentioned, the sum of 5,735*l.* 17*s.* 1*d.* Bank 3 per. cent. Annuities. And he found, that there were several sums of money due to several persons, to the amount in the whole of 16,623*l.* 8*s.* 7*d.*, as creditors of Lady Pryce, for principal and interest in respect of their several debts, besides the sum of 4,727*l.* 4*s.* 10*d.*, due to Francis *Morgan, as legal personal representative of John Morgan. And, amongst other things, he found, that there was due to Sarah Burney, as the legal personal representative of John Burney, on judgment, the sum of 1,000*l.*, and, on bond, dated the 24th of December, 1804, in the penalty of 6,400*l.* for securing the payment of 3,200*l.* and interest, including the 1,000*l.* due on judgment, and also found due to the personal representative of Jaques, under the indenture of January, 1772, the principal sum of 1,500*l.*, and for interest on part thereof

[*161]

the sum of 3,754*l.* 8*s.* 3*d.*, making, in the whole, 5,254*l.* 8*s.* 3*d.*: and he also found, that a debt of 240*l.* was due to the personal representative of Joseph Hughes; and that the sum of 4,729*l.* 0*s.* 4*d.* was due to John Henry Deffell on mortgage.

By an order made on the 14th of December, 1831, it was referred to the Master to ascertain the priorities of the charges on the estate of Lady Pryce; and the Master, by a subsequent report, dated the 7th of July, 1832, certified, that the debt due to the estate of Thomas Jaques and the personal representative of Joseph Hughes was the first incumbrance on the estate, and the produce thereof. The report was confirmed, and by an order dated the 31st of July, 1832, it was ordered, that out of the 10,989*l.* 17*s.* 1*d.*, the fund then in Court, the sum of 5,318*l.* 1*s.* 3*d.* and also the sum of 5*l.* 15*s.* 6*d.* for subsequent interest should be paid to Jane Bowman, the then legal personal representative of Thomas Jaques, and that also thereout the sum of 240*l.* should be carried over to the account of the legal personal representative of Joseph Hughes. Under this order, and out of the monies standing to the credit of the cause for administering the estate of Lady Pryce, the several sums of 5,318*l.* 1*s.* 3*d.*, 5*l.* 15*s.* 6*d.*, and 240*l.* were paid. And the order, after providing for these payments, and *for payment of what was due to Deffell, directed, that [*162] the sum of 537*l.* 11*s.* 8*d.*, being the residue of the fund in Court, should be paid to Francis Morgan, towards payment of 4,795*l.* 19*s.* 10*d.* the debt found due to his testator John Morgan.

In this manner, the whole of the estate of Lady Pryce, which was administered in the suit, was applied, without paying the whole of her debts, and particularly, without paying any part of the amount of what was due on the bond of the 24th of December, 1804, to the estate of John Burney from the estate of Lady Pryce.

The plaintiff is now the legal personal representative of John Burney, and appears to be entitled to the debt which remains due to his estate from the estate of Lady Pryce, and he now claims to have the amount paid out of the funds which were in Court to the credit of the cause, originally called *Earl Temple* v. *Pryce*. The funds constituted part of the estate of Sir John Powell Pryce, and the plaintiff says, that the debts due to Jaques and to Hughes were debts of Sir John Powell Pryce, and ought to have been paid out of his estate, and would have been paid out of his funds in that cause, if the order of January, 1785, had been duly prosecuted: that, nevertheless, Lady Pryce, having, by deeds of 1772, and perhaps by subsequent acts, rendered her estates liable to pay those debts, the

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persons to whom they were due had a right to be paid out of her estate; but her liabilities and the liability of her estate can only be considered as in the nature of a suretyship, and payment of the debt, primarily due from the estate of Sir John Powell Pryce the principal debtor, having, in fact, been made out of the estate of one who was only a surety, the latter ought to be recouped or reimbursed
[*163] out of the former, to the extent *to which Lady Pryce's estate was so applied, for the purpose of paying to Morgan what remains due to the estate of John Morgan on his mortgage, and next of paying what is due to the plaintiff.

Mr. Evors, admitting in the result, that he was the heir-at-law of Sir John Powell Pryce, and that the 20,972*l.* 10*s.* 1*d.* in question, was the accumulated surplus of the purchase-money arising from the sale of a part of Sir John Powell Pryce's real estate, after paying a mortgage thereon; and claiming to be entitled, in the character of heir, if he had no other or better title, which however he claimed to have, insists, that Jaques and Hughes were not creditors of Sir John Powell Pryce; that the debts, if any, were debts of Lady Pryce, who is said to have been a very extravagant person, having great power and influence over her husband, Sir John Powell Pryce, who was blind, incapable of acting for himself, under great pecuniary embarrassment, and likely to be imposed upon. There is no evidence of the supposed facts on which these suggestions are founded. It appears, I think sufficiently, that the debts were secured by the deeds of January, 1772, and that the debts ought to be considered as primarily the debts of Sir John Powell Pryce. I must, under the circumstances of this case, presume that the deed of January, 1772, was duly executed, and that the memorandum of February, 1776, was duly signed by Sir John Powell Pryce, and there is no reason to conclude, that the debt was the debt of Lady Pryce, though she executed the deed, and signed the memorandum of the account, stating the sum for which her estate was intended to be part security.

But Mr. Evors next denied, that Burney was a creditor of
[*164] Lady Pryce, and he suggested, without proving, *circumstances from which he wishes it to be concluded, that no consideration was given for the bond which Burney held. There being no evidence of the truth of such suggestions, and the debt having been duly established against the legal personal representative of Lady Pryce, I think that, upon this occasion, I am bound to consider it a good debt.

Under these circumstances, and from the Master's reports, it appears, that, in consequence of the payment of debts of Sir John Powell Pryce out of the estate of Lady Pryce, the debts of Lady Pryce, or at least this debt of Lady Pryce, has not been paid.

Mr. Evors then contended, that the plaintiff came too late, and that his claim ought to be barred by lapse of time. It is not necessary to consider how this might have been, if there had been no fund in Court, but the surplus purchase-money of Sir John Powell Pryce's estate, which remained, after satisfying Earl Temple's mortgage, was paid into Court in the year 1782. In 1785, there was a reference to the Master to enquire what were the incumbrances thereon. That order was not effectually acted upon, till Mr. Evors petitioned to have the money paid to him, as the heir of Sir John Powell Pryce; and it was upon that occasion, and in 1840, that an order was made, for an enquiry as to incumbrances. Under that order, the plaintiff made his claim, which was rejected by the Master, as it is distinctly stated by Mr. Gray, on the ground that the claim was founded on an equity. The plaintiff, very soon afterwards, filed this bill to establish his equity, and I am of opinion, that he is not precluded from relief by lapse of time.

But lastly, Mr. Evors alleged, that having no notice of the plaintiff's claim against the estate of Sir J. P. *Pryce he purchased, and caused to be assigned to himself, various judgments and incumbrances upon the estate of Sir John P. Pryce, to an amount exceeding the amount of the fund in Court. [*165]

But I conceive, that this is not a case which is affected by notice. If it were, there seems to be some reason to think, that Mr. Evors had notice of the circumstances under which the plaintiff's claim arises, and for further satisfaction, I should direct an enquiry on the subject; but, independently of any question of notice, it seems to me, that we have to consider in what character Mr. Evors became entitled to the estate; and if he became entitled as heir, what was the full amount and value of all the estates which he derived under the same title, and what was the amount of the money which he paid in satisfaction of the charges and incumbrances thereon; for those sums he will be entitled to priority before the plaintiff, upon all the estates, and if the estates, exclusively of the particular portion against which the plaintiff's claim is made, should be insufficient to satisfy him the monies so paid, he will be entitled in priority, in respect even of this particular fund.

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Now Mr. Evors became entitled, as heir of Diana Evors, and through her, as heir of Sir Edward Manley Pryce, who was heir, and took subject to the provisions in the will of Sir John Powell Pryce, as heir-at-law of Sir John Powell Pryce; and in his answer in this cause, Mr. Evors claimed title to the estate, as heir of Sir John Powell Pryce.

This is, therefore, the case of an heir, purchasing and procuring assignments of debts and incumbrances on the estate descended to him for less than their full amounts. He is entitled to the full [*166] benefit of all that *he paid; but, as against other creditors on the estate, he is to have credit for no more than he paid.

And on the whole, I am of opinion,

1st. That the sum claimed by Jaques, and paid to his legal personal representative, was and ought to be considered as the debt of Sir John Powell Pryce, and due from his estate.

2nd. That the same having been paid out of the estate of Lady Pryce, her legal personal representatives ought to be considered as creditors against the estate of Sir John Powell Pryce, for the full amount thereof.

3rd. That the money paid into Court in the cause of *Earl Temple* v. *Pryce* was, or ought to be considered as, part of the real estate of Sir John Powell Pryce, and that Mr. Evors, as the heir-at-law of Sir John Powell Pryce, became entitled thereto, subject to the payment of the debts chargeable thereon.

4th. That Mr. Evors, having paid various charges and incumbrances upon the estate of Sir John Powell Pryce, whose heir he was, is entitled, against other claimants on the estate, to have credit for the full amount of the several sums of money so paid, but not for any greater amount than he actually paid.

5th. That if the unsold estates of Sir John Powell Pryce, to [*167] which the defendant became entitled as heir, *are of value less than sufficient to satisfy all the monies paid as aforesaid by Mr. Evors, then Mr. Evors is entitled to be paid the residue out of the fund in Court, in priority to the legal personal representatives of Lady Pryce; but if the value of such estates exceeds the amount of the money so paid by Mr. Evors, then the legal personal representatives ought to be paid what is due to them, out of such fund, in the first place.

I, therefore, propose to declare, that the plaintiff, as the legal personal representative of John Burney, is entitled to be paid what is due to him in that character, out of the estate of Lady Pryce,

and that the estate of Lady Pryce having been exhausted by the application of it in payment of debts which were primarily due from Sir John Powell Pryce or his estate, but for which the estate of Lady Pryce was liable, the plaintiff is now entitled, out of the estate of Sir J. P. Pryce (subject to prior claims thereon, if any, and to the extent to which the estate of Lady Pryce was applied in payment of the debts of Sir John Powell Pryce), to have the estate of Lady Pryce recouped, in order that the same may be now applied in satisfaction of her debts reminiang unpaid.

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Refer it to the Master to enquire and state to the Court, what debts and sums of money and to what amount, which were primarily due from Sir J. P. Pryce or his estate, were paid out of the estate of Lady Pryce, under the decree for the administration of her estate.

And let the Master enquire and state what estates Mr. Evors became entitled to, as heir-at-law of Sir John P. Pryce, and what was the full amount and value thereof in the whole, and what charges and incumbrances the same were subject to, and what sums of *money and to what amount in the whole, were paid by Mr. Evors, in or towards satisfaction of such charges and incumbrances, or any of them, or in purchasing the same, or procuring the same to be transferred or assigned to him or to any other person for his own use or benefit.

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Reserve further directions and costs (1).

BAYNTON *v.* HOOPER.

(10 Beav. 168.)

1847. *Jan.* 29.

Rolls Court. Lord LANGDALE, M.R.

Upon an application to the Court to appoint a guardian *ad litem* to an infant resident within the jurisdiction, his appearance in Court will not be dispensed with, unless under special circumstances.

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MR. BIRD applied for the appointment of a guardian *ad litem* of infant defendants, who were resident within the jurisdiction, without either a commission or their personal appearance in Court.

There were no special circumstances stated for deviating from the usual practice, except that the plaintiff threatened an attachment. The MASTER OF THE ROLLS, in the first instance, had made

(1) This case was affirmed by Lord COTTENHAM on the 16th of February, 1848. No report of the appeal can be found.

BAYNTON v. HOOPER.

the order, but the Registrar, before drawing it up, required that the matter should be drawn to the attention of the Court.

Mr. Bird again mentioned the case.

The MASTER OF THE ROLLS said he would consider the case; but on the following day he refused the order.

1847.
Jan. 27.

Rolls Court.
Lord LANGDALE, M.R.
[181]

IN RE NEATE (1).

(10 Beav. 181—184.)

The bill of trustee's solicitor was delivered on the 27th of November, and on the 10th of December paid, after some deductions, by the solicitor of the cestui que trust, as he alleged, under protest. A petition for taxation presented by the cestui que trust in January following was dismissed with costs.

The general rule is, that a paid bill is not to be referred for taxation; and special circumstances and grounds are required to take a case out of this rule.

IN August, 1846, the petitioner, Mr. Poore, became entitled to a sum of 16,666*l.* standing in the name of four trustees. Being desirous of having it transferred to him, he applied to the trustees for a power of attorney, which it was agreed should be given, on his executing to them a proper release.

Mr. Neate, the respondent, acted for three trustees; the fourth trustee was represented by another solicitor; and the petitioner, the cestui que trust, by Mr. Waugh.

On the 27th of November, Mr. Neate delivered his bill for preparing the release &c., amounting to 16*l.* 6*s.* 8*d.* which was objected to by Mr. Waugh. Ultimately, on the 10th of December, the bill, voluntarily reduced to 15*l.*, was paid, Mr. Neate declining to deliver over the power of attorney unless on payment of his costs.

On the 8th of January, a special petition was presented by Mr. Poore, for the taxation of the bill, on the ground that it had been paid under pressure, and after protest. The petition stated that the bill contained unreasonable and extravagant charges, which were specified: and it also complained that the cestui que trust had been put to the expense of two sets of costs, in consequence of the employment, by the trustees, of two solicitors.

Mr. Greene, in support of the petition, argued, that payment had been obtained under pressure arising from the necessity of

(1) *In re Boycott* (1885) 29 Ch. D. 571.

procuring a transfer of the funds before *the closing of the transfer books, which took place on the 10th of December, and was made under protest; that, as there were over-charges, the solicitor ought to show reasons why the over-payments should not be ascertained and repaid. [*182]

Mr. Turner, contrà, argued, that the petitioner, having had the full opportunity of taxing the bill between the 27th of November and the 10th of December, and having then voluntarily paid it, through an independent solicitor, and after some deduction, was not entitled to open this settled account. That as to pressure there had been none; that "protest," if it had really taken place, was of no avail; and that, as to the employment of two solicitors by the trustees, the respondent was not answerable to his clients, and much less to the petitioner.

Mr. Greene, in reply.

THE MASTER OF THE ROLLS:

In this case, the relation of trustee and the cestui que trust existed between four persons and the petitioner Poore; the relation of solicitor and client between Neate and three trustees, and relation of solicitor and client between the fourth trustee and other solicitors; that is the state of the case.

The petition prays, that a bill which has been paid may be taxed; and it is asked, that I may adhere to the general rule, that a paid bill may be taxed unless there be some reason against it. There is no such general rule. The general rule is, that a paid bill is not to be referred for taxation, and a case is taken out of that rule only by special circumstances, and on special grounds. It is not the rule, that special reasons ought *to be shown why a paid bill is not to be taxed, but, on the contrary, why the bill ought to be taxed. [*183]

I think that the petitioner has been subjected to considerable hardship, because, by this want of agreement between the trustees, he has had to pay two solicitors when one might have been sufficient. He comes as cestui que trust, asking that the bill may be taxed; the taxation is to take place not as between him and the solicitor, but as between the solicitor and the trustees his clients; and the question is, if the trustees themselves could obtain the order, which is now asked, not by them, but by a party deriving his power to tax solely under the statute.

In re NEATE.

I have stated, over and over again, that the statute does not alter the relation between solicitor and client; and though it gives the cestui que trust a right to tax a bill which is payable out of his monies, yet it does not entitle him to say, that the solicitor is not entitled to receive all that is due, as between him and the trustees, his clients.

The bill was delivered on the 27th of November. It was the subject of considerable discussion: some part was taken off, and the bill was paid on the 10th of December under protest. Protest, I must again repeat, is nothing, unless there are other circumstances which justify a taxation after payment. It is material only as showing that the parties are inclined to quarrel with the bill; but I do not know what it amounts to, except as notice to quarrel with the bill if the facts make it expedient and right to do so. Then as to the employment of two solicitors, have I a right, under the statute, to visit upon the solicitor employed by three trustees
[*184] the consequences of a disagreement with *the fourth, and that too at the instance of the cestui que trust, who has no such right under the statute; and has the cestui que trust a right to say to the solicitor employed by the trustees, "you shall not have what you have earned from your client, because it would not be allowed as between me and my trustees?" I think not. The petitioner has misconceived his rights, and his petition must, therefore, be dismissed with costs.

1847.
Jan. 27.

Rolls Court.
Lord LANGDALE, M.R.
[187]

IN RE HAIR (1).

(10 Beav. 187—191; S. C. 16 L. J. Ch. 163; 11 Jur. 139.)

A solicitor was employed by three partners. He brought an action against them for his bill of costs, and representing one, he obtained judgment against him by default: Held, that this did not prevent the others from obtaining an order for taxation: Held, also, that an application for taxation by the two was regular, the third not concurring, but that he ought to be served with the petition.

The taxing Masters have jurisdiction to determine questions of retainer.

THE petitioners John and Joseph Cox, together with William Cox, employed Mr. Hair as their solicitor in respect of the partnership matters of the three.

William Cox also employed him in matters relating to his private estate, called the Cot Farm estate; but the petitioners insisted they had not employed Mr. Hair in this latter matter, and that they were not liable for the costs thereof.

(1) *In re Salaman* [1904] 2 Ch. 201, 63 L. J. Ch. 664, C. A.

In re HAIR.

In August, 1846, the bill of costs was delivered, amounting to 198*l.* including charges for both matters. On the 27th of November, Mr. Hair commenced an action at law against his three clients. William Cox appeared through Mr. Hair, who signed judgment against him for want of plea, but the two petitioners pleaded to the action.

On the 7th of January, John and Joseph Cox presented this petition for the taxation of the bill, and to stay the proceedings at law, alleging that they had been unable to obtain the concurrence of William in the presentation of the petition, insisting that they had not employed the respondent in the separate affairs of William Cox, and submitting to pay what might be found due from the partnership.

It appeared that William Cox, in reference to the proceedings, had said, "It won't do for me to fly in the face of Hair: I am afraid to go against him: what can I do?"

Mr. Kindersley and *Mr. Hitchcock*, in support of the petition: [188]

The petitioners admit their liability, as respects the partnership matters, and submit to pay. They are only desirous of ascertaining, in the proper mode, the extent of their liability to enable them to discharge it. As to the other part of the bill, the question of retainer will be decided by the taxing Master, who has jurisdiction (1).

The petitioners are unable to obtain the concurrence of William Cox, in this petition: the reason is obvious: he is under the control of the respondent.

Mr. J. Sidney Smith, for Mr. Hair. * * *

Mr. Kindersley, in reply: [189]

No verdict has been obtained against the two petitioners; and as to the third party, the verdict is merely collusive, and to prevent taxation. There are, therefore, sufficient "special circumstances" to induce the Court to interfere.

Secondly; it is not necessary that all the parties should join. Even if that were the rule, this is a case of exception, for the petitioners are prevented from complying with it by the respondent himself.

Thirdly; the Master is perfectly competent to determine the question of retainer: that point has already been decided.

(1) See *In re Bracey*, 68 R. R. 93 (8 Beav. 266).

In re HAIR.

THE MASTER OF THE ROLLS:

The petitioners say they never retained Mr. Hair, in relation to the business which he did for William Cox separately, though they did for the joint business. They state that they are willing to pay the whole which is due from them; and desire to have a taxation in
[*190] order *that they may pay it. In the taxation, there will be an enquiry as to the retainer, in the particular business which he has charged.

It appears that Hair has brought an action against the three partners for the whole amount of the bill. He himself has appeared for William, and on that has obtained judgment against him. In this state of things, a petition being presented by John and Joseph, it is said that the prayer of this petition ought not to be granted; first, because there has been a judgment against William. This judgment, it is said, ought to be looked upon as a verdict against the three, and because there has, in this way, been a verdict against three, therefore, there is to be no taxation. I have not heard any authority in support of this ingenious argument, and cannot adopt it.

The other objection is, that the application is made by two out of three. True it is the petition of two legally liable, submitting to pay what is justly due. Can Mr. Hair desire to have any thing more than is legally due? But why is it not the petition of the three? Because there is manifestly either a collusion between the respondent and William Cox, or an oppression to which the latter is compelled to submit; besides this, the circumstances are special enough to justify the Court in saying, that the solicitor shall not escape having his bill taxed.

I am of opinion that what is asked is not contrary to the practice of the Court. True it is that, after verdict, a court of law will not allow a taxation, and true it is, that this Court has thought it necessary to adopt the rule: but, before verdict, this Court always
[*191] secures the taxation. It would be an idle thing to *attempt a taxation of a bill of costs before a jury on the evidence of witnesses; for it is evident, from the nature of the enquiry, that it could never be satisfactorily done.

The last question is, whether there ought to be a trial of the question of retainer. What is there to try? There is nothing in this which may not as well be tried by the taxing Master as by a jury. The taxing Masters are in the daily habit of trying such questions without any difficulty, and I think, therefore, there is no reason for allowing this trial to take place.

I think that William Cox ought to be served with the petition; and, if the respondent desires it, I will require the petitioners to give judgment to be dealt with according to the result of the taxation. Subject to that, let the common order be made for taxation, and reserve the question of costs.

In re HAIR.

SCAWIN *v.* WATSON.

1847. *March* 4.

(10 Beav. 200—203; S. C. 16 L. J. Ch. 404; affd. 11 Jur. 576.)

Rolls Court. Lord LANGDALE, M.R.

On Appeal. *July* 9.

Bequest to a daughter of 1,000*l.* stock and 70*l.* a year for life, which two sums were to be under the trust of the executors, and not to permit her to assign "her said annuities," and pay the interest from the 1,000*l.* to her for her life, and at her decease, to divide it between her children: Held, that the daughter took for life only, and not an absolute interest, subject to be defeated by the interests given to her children.

Distinction between an absolute bequest with a subsequent gift in derogation, and a limited bequest followed by a subsequent restricted gift over. In the former case, the absolute gift remains upon failure of the subsequent gift, but in the latter the limited bequest is not enlarged by such an event.

Lord COTTENHAM, L.C.

[200]

THIS case came before the Court upon demurrer.

The testator, amongst other things, expressed himself as follows: "I give and bequeath unto my daughter Harriet Watson 1,000*l.* out of my 3½ per cent. Reduced stock and also 70*l.* a year during her natural life, to be paid unto her in four quarterly payments, after she attains the age of twenty-one years and six months; which two sums I direct and devise to be under the trust of my executors, namely, not to permit my said daughter to assign her said annuities to any one, and the interest arising from the 1,000*l.*, as it becomes due, to pay the same to her for her life, into her own hands, and her receipt shall be a sufficient discharge, even if she marry; and at her decease, upon trust to divide the principal sum of 1,000*l.* equally, between and amongst all and every her child and children. I further bequeath to my daughter Harriet Watson 10*l.* a year until she attains the age of twenty-one years and six months."

The testator died in 1829.

In 1834, Harriet Watson attained twenty-one, married, and died in 1846, without ever having had a child. The plaintiff, her husband and administrator, claimed, *by this bill, to be entitled to the sum of 1,000*l.* 3½ per cent. Reduced Annuities.

[*201]

Mr. Purvis and *Mr. F. Bayley* in support of the demurrer:

The plaintiff has no interest in the sum of 1,000*l.* stock, because

SCAWIN v. WATSON.

there is no absolute gift subsequently modified, but the primary bequest is expressly restricted to the life of the daughter, with a subsequent limitation to her children.

(THE MASTER OF THE ROLLS: The distinction always is between an absolute bequest with a subsequent gift in derogation, and a limited bequest followed by a subsequent restricted gift over.)

Mr. Kindersley and *Mr. Toller*, for the plaintiff, and in support of the bill, contended, that there was an absolute interest in the stock given to the daughter in the first instance. [They cited *Mayer* v. *Townsend* (1).]

[202]

Mr. Purvis, in reply.

[*Whittell* v. *Dudin* (2), *Campbell* v. *Brownrigg* (3), *Gompertz* v. *Gompertz* (4), *Ring* v. *Hardwick* (5), *Hulme* v. *Hulme* (6), *Arnold* v. *Congreve* (7), *Carver* v. *Bowles* (8), *Green* v. *Harvey* (9), *Winckworth* v. *Winckworth* (10), *Eaton* v. *Barker* (11), and other cases, were cited.]

THE MASTER OF THE ROLLS:

In this case, as in all others of the same description, the question is, whether, having regard to the general purport and effect of the will, the words import an absolute gift modified only by certain restrictions, so that the first absolute gift may have its full effect in every event to which the restrictions are inapplicable, or whether the effect is to give a restricted or limited interest only, so as not to be affected or enlarged by any failure of the subsequent limitations. That is the question.

In this case, I confess I cannot find any general scheme furnishing me with a key to the construction of this particular bequest; nor do I think that where the testator has shown so great variety of intention in regard to his children as this testator has done, that I could construe the gift to one by the gift to others. I am

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therefore under the necessity of confining myself to *this particular bequest to this particular daughter. It is an extremely ill drawn will, and I have no means of arriving at a distinct notion of what

(1) 52 R. R. 180 (3 Beav. 443).
(2) 22 R. R. 124 (2 J. & W. 279).
(3) 65 R. R. 390 (1 Ph. 301).
(4) 2 Ph. 107.
(5) 50 R. R. 202 (2 Beav. 352).
(6) 47 R. R. 326 (9 Sim. 644).
(7) See 31 R. R. 106 (1 Russ. & My. 209).
(8) 34 R. R. 102 (2 Russ. & My. 301).
(9) 58 R. R. 127 (1 Hare, p. 428).
(10) 68 R. R. 205 (8 Beav. 576).
(11) 70 R. R. 162 (2 Coll. 124).

he would have done, if the event which has happened had come under his contemplation. My opinion, however, is, that this does not amount to an absolute gift, but that it is restricted and limited, and amounts to this,—"I give 1,000*l.* to trustees for the benefit of my daughter, to pay her the interest for her life, with remainder to her children after her decease." If you put these words together, they, in the result, really come to this,—he has given to his daughter a sum for her life, which he directs shall be under the trust of his executors, and under certain restrictions which he has expressed.

Let the demurrer be allowed without costs.

1847. *July* 9.

The cause now came on before the Lord Chancellor [on appeal].

[11 Jur. 577]

Tinney and *Toller*, for the plaintiff, contended, that the first part of the will contained an absolute gift to H. Watson of the 1,000*l.*, and that there were no subsequent directions tending to diminish the original gift; that the present case was thus distinguishable from *Gompertz* v. *Gompertz* (1).

Purvis and *Bayley*, for the defendants, the executors of J. Watson, were not called on by the Lord Chancellor.

THE LORD CHANCELLOR:

I see no reason for departing from the rule laid down in *Gompertz* v. *Gompertz;* but whether any case falls within that rule must be a question depending on the facts of the particular case. The rule referred to in *Gompertz* v. *Gompertz* is what was laid down in other cases, that, where there is a gift, and then a direction as to the manner in which the legacy is to be invested and applied for the benefit of the legatee, this is not a diminution or qualification of the original gift, but merely a direction as to the mode in which it is to be dealt with and enjoyed. The essence of this rule is, that there is a gift, but the difficulty in the present case is to find such a gift. The testator gave unto "his daughter, Harriet Watson, 1,000*l.* out of his 3*l.* 10*s.* per cent. Reduced stock, and also 70*l.* a year during her natural life." These words must be read in their ordinary sense, and the words "during her natural life" must refer to the antecedent gift. There are two subject-matters forming this gift, but the whole is contained in one sentence, and the conclusion as to both is, that they are to be enjoyed for the natural life of the

(1) 2 Ph. 107; to be reported in a later volume of the Revised Reports.

SCAWIN v. WATSON.

legatee. This does not make an absolute gift. The gift is of 1,000*l.* money, not stock; it is to be raised out of stock, and this and the 70*l.* a year are to be paid to his daughter, for her natural life, in four quarterly payments, after she attains twenty-one years and six months. The will does not, however, stop here, for the testator goes on to direct and devise these two sums to be under the trust of his executors. He calls the gifts "annuities," and declares the duties of the trustees "not to permit his said daughter to assign her said annuities to any one; and the interest arising from the 1,000*l.*, as it became due, to pay the same to her for her life into her own hands, and her receipt should be a sufficient discharge, even if she married; and, at her decease, upon trust to divide the principal sum of 1,000*l.* equally between and amongst all and every her child and children." The interest to arise he thus intends for his daughter, and the principal for her children, or, if she had none, then for his executors. This is the natural construction of the clause in question, but if it were not, and the latter words could be separated from those in the first part of the sentence, I should have still thought the same construction applied. The testator gives the 1,000*l.* to the trustees; this of itself would have been contradictory of an absolute gift to his daughter, for he could not mean such a gift for both. The trustees under this would take upon trust, and the only trust would be for the daughter for life, remainder to her children. The first ground, however, is the true one on which to rest the case: it is this, that there never was an absolute gift. The MASTER OF THE ROLLS is right, and the appeal must be dismissed, with costs.

1847.
March 6, 8.

Rolls Court.
Lord LANGDALE, M.R.
[10 Beav. 203]

HUBBARD *v.* YOUNG.

(10 Beav. 203—206; S. C. 16 L. J. Ch. 182; 11 Jur. 177.)

A testatrix gave her property, with certain exceptions, to her grand-daughter, and afterwards stated "that her property was in the Bank and India House:" Held (assuming her to take for life), that she was entitled to enjoy the Bank and India stock in specie, and that it was not liable to be converted into Consols.

THE testatrix bequeathed as follows: "I give my property to my grand-daughter Elizabeth Matilda Hubbard, except 500*l.* I give to my niece Elizabeth Howorth likewise 500*l.*"

The testatrix then enumerated other pecuniary legacies and proceeded: "Should my grand-daughter marry, I desire her issue may be her heirs; if she should die and not leave any issue behind

her, I give all my property to be divided between my sister *Howorth's children, and my brother Richard Sigery's daughter and her children. If my daughter and myself should die before my grand-daughter is of age, it is my desire that Mrs. Jane Hubbard may have the care of her till she comes of age, which is to be at her twentieth year, at which time she is to receive the dividend herself, but not the principal: that is not to be spent. My property is in the Bank and India House." [*204]

It was assumed, under the circumstances, that the grand-daughter was entitled for life only; and the question was, whether the grand-daughter was entitled to enjoy, in specie, a sum of 1,000*l.* East India stock, and a sum of 3,090*l.*, 3*l.* 10*s.* per cent., or whether it ought to be converted into Consols.

Mr. Kindersley and *Mr. Shapter* for the daughter, contended, that she was entitled to enjoy the Bank and India stock in specie; that the tendency of modern decisions was contrary to the doctrine of *Howe* v. *Earl of Dartmouth* (1). That the effect of the gift was this—"I give my India and Bank stock and other property to my grand-daughter for life; with remainder over:" and that as this was a permanent and not a wearing out property, like a leasehold, the doctrine was therefore inapplicable.

Mr. Jervis, for her husband.

Mr. Rogers, for another party, declined arguing the point.

Mr. Craig and *Mr. Wood* argued, that this was a residuary gift to one for life, and that the Bank and India stock (which was not the whole of the property) ought *to be converted into Consols; [*205] the only investment which the Court recognised as doing justice between parties interested in succession.

That the statement that the property was in the Bank and India House, was merely descriptive of the locality of the assets, for the convenience of the executors.

Mr. Turner and *Mr. T. H. Hall* for trustees.

[*Collins* v. *Collins* (2), *Bethune* v. *Kennedy* (3), *Pickering* v. *Pickering* (4), *Goodenough* v. *Tremamondo* (5), *Vaughan* v. *Buck* (6), *Sutherland* v. *Cooke* (7), were cited.]

(1) 6 R. R. 96 (7 Ves. 137 a).
(2) 39 R. R. 337 (2 My. & K. 703).
(3) 43 R. R. 153 (1 My. & Cr. 114).
(4) 48 R. R. 104 (2 Beav. 31; 4 My. & Cr. 289).
(5) 50 R. R. 262 (2 Beav. 512).
(6) 65 R. R. 337 (1 Ph. 75).
(7) 66 R. R. 162 (1 Coll. 498).

HUBBARD v. YOUNG.

THE MASTER OF THE ROLLS:

There is sufficient room for doubt in this case: and we must look to the general intention, for we cannot expect to find a specific direction on the subject. According to the doctrine of the present day, the question does not depend on the legacy being specific or not; but you are to collect from the will, whether the testator intended that the property should, at all events, be enjoyed by those in remainder after the expiration of the prior interest. Generally a testator intends that every body named as an object of his bounty in succession shall enjoy something; but if the property be allowed to wear out, those in remainder may get nothing. Where it is probable at least, that he intends them to take something in succession, his intention can only be secured by having a [*206] permanent *fund. In this case the fund is permanent, but not a species of investment which the Court recognises as the proper and best security. Even where the investment is in the Five per Cents., the Court has been in the habit of saying, that it shall not be continued.

Now what does the testatrix here say: "I give my property to my grand-daughter" with certain exceptions, and should she marry, her issue are to be her heirs, but if she dies leaving no issue, then "all my property" (that is, the property she had previously given to her grand-daughter) is to be divided amongst certain persons. She is only to have the dividends and not the principal; and she then states, "my property is in the Bank and India House." Therefore she is to have the dividends of her property, which is in the Bank and India House, for life, and others are to take the same property after her. I conceive there is sufficient indication that she intended the grand-daughter to enjoy all that which she called "her property," and which she described as being in the Bank and India House, and that there is no sufficient reason to induce the Court to apply the rule of conversion, which, though of great importance in many cases, is of very little importance in the present.

1846.
Dec. 7, 12, 19.

[238]

BREYNTON *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY.

(10 Beav. 238—246.)

[SEE the report of this case on appeal, *ante*, p. 85, taken from 2 Coop. temp. Cottenham, 108.]

JORDAN *v.* FORTESCUE (1).

1847. *April* 21, 26.

(10 Beav. 259—262; S. C. 16 L. J. Ch. 332; 11 Jur. 549.)

Rolls Court. Lord LANGDALE, M.R.

By a codicil, a testator gave to A. B. 500*l.*, in addition to 1,500*l.* which he had before bequeathed to him. The testator had previously bequeathed two legacies only of 500*l.* and 500*l.* each: Held, that, by implication, the legatee was entitled to 2,000*l.*

[259]

MR. THOMAS GRENVILLE made a will with three codicils.

By the third codicil, he expressed himself as follows: "I give and bequeath to William Jordan 500*l.* in addition to 1,500*l.* which I have before bequeathed to him."

In fact, the testator had before bequeathed to William Jordan only 1,000*l.*, viz., 500*l.* by his will and 500*l.* by his first codicil.

The question in the cause, which came on by way of demurrer, was, whether the plaintiff William Jordan, the legatee, was entitled to 2,000*l.*, the amount of 500*l.* given by the third codicil and of 1,500*l.*, which the testator supposed he had before bequeathed to him, or to *1,500*l.* only, the amount of 500*l.* given by the third codicil, and 1,000*l.* which the testator had, in fact, before bequeathed to him.

[*260]

Mr. Kindersley and *Mr. Pole* for the executor:

There is no bequest by the third codicil beyond that of 500*l.*, for the testator says: "I give and bequeath W. J. 500*l.*" It is true, he adds, "in addition to the 1,500*l.* which I have before bequeathed to him;" but here it is plain the testator, who probably had not his will and codicil before him, made a mistake as to the amount previously given. The legatee is, therefore, entitled, in the whole, to 1,500*l.* only.

Milner v. *Milner* (2) will be cited by the other side, where a testator gave his daughter "3,500*l.*, which, with 6,000*l.* she is entitled to by my marriage settlement, and 500*l.* from her father-in-law, make up 10,000*l.*, which is the sum I design she shall have for her fortune;" and it happening that she was entitled to 5,000*l.* only by the settlement, it was held, that she was entitled to a legacy of 4,500*l.*, to make up the 10,000*l.*; but then, the testator expressly said that he designed her to have 10,000*l.* for her fortune. There is no such expression in the present case. Again, the testator might have given an additional 500*l.* by a codicil which he afterwards destroyed. It was not to be set up by this erroneous recital: *Adams* v. *Adams* (3).

(1) *Farrer* v. *St. Catherine's College, Cambridge* (1873) L. R. 16 Eq. 19, 42 L. J. Ch. 809, 28 L. T. 800, and see *post*, p. 175.

(2) 1 Ves. Sen. 106.

(3) 58 R. R. 181 (1 Hare, 537).

JORDAN v. FORTESCUE.

Mr. Turner and *Mr. Cairns* for the legatee:

The general intention of the testator is clear; he intended the legatee to have 2,000*l.* in the whole, or a legacy of 500*l. plus* 1,500*l.* The description may be erroneous, but "*falsa descriptio non nocet.*"

[*261] The case of *Bibin* v. **Walker* (1) is in point. There it was held, that a devise of lands, which the testator had before given to A., over to B. on a given event, was a devise by implication to A.

Godolphin's Orphan's Legacy, p. 447, was also cited.

Mr. Kindersley, in reply:

The only question is, whether 1,000*l.* is given by the third codicil; that cannot be, for the testator expressly states the gift to be of 500*l.*

THE MASTER OF THE ROLLS:

I will look at the cases. The testator gives 500*l.* in reference to 1,500*l.* supposed to have been previously given. I can hardly doubt he intended the aggregate, whatever mistake he might have made.

April 26. THE MASTER OF THE ROLLS:

I think the legatee is entitled to the 2,000*l.*

When the testator was making his third codicil, he was thinking of what he himself had done and intended to do for his legatee. He was acting under no mistake as to any right or interest which the legatee might have from any other source; he was thinking only how far his own bounty was to extend: what he had done might have been revoked or increased, or diminished at his own pleasure. If he had a purpose to give a particular sum, it was immaterial how much of it he had given before, or how much of it was then to be given.

[262] It appears from the codicil itself, that he proceeded on the supposition that he had before given 1,500*l.*, which was not so. But having the whole in his own power, he is so far from manifesting any wish to diminish what he supposed before given, that he proceeds to make an increase, and expressly gives 500*l.* "in addition to the 1,500*l.*" On consideration, I cannot bring myself to doubt, that the testator, in giving 500*l.* in addition to 1,500*l.*, meant to give 2,000*l.*; and I do not think the intention less apparent, because the testator erroneously supposed that it had been previously

(1) 2 Amb. 661.

indicated to the extent of 1,500*l.*, whereas, in fact, it had been previously indicated to the extent of 1,000*l.* only. He must have been aware, that the amount of that which the legatee was to take depended on himself alone—knowing this, and considering what he was to give, he says, "500*l.* in addition to 1,500*l.*," and I think that the probability is sufficiently strong to constitute a gift of the 2,000*l.* by implication.

The demurrer was overruled, and, by agreement, the cause was afterwards set down, and a decree for payment made, the costs of all parties being paid out of the estate.

LANCASTER *v.* EVORS.

(10 Beav. 266—269; S. C. 16 L. J. Ch. 308.)

1847. *Jan.* 16. *May* 6.

Rolls Court. Lord LANGDALE, M.R.

A husband and wife mortgaged their respective estates for securing the husband's debt. Both estates were sold and conveyed free from the mortgage, and in 1832 the debt was paid out of the produce of the wife's estate. In 1841, a bill was filed to have the amount recouped out of the produce of the estate of the husband which was in Court: Held, that the representative of the wife was not entitled to interest on the amount paid.

[266]

THE circumstances of this case are stated at length, *ante*, p. 99.

It was now asked, that the plaintiff might be declared entitled to interest on the amount which the estate of Lady Pryce had, in 1832, paid, as surety for Sir John Powell Pryce.

Mr. Purvis and *Mr. Malins* for the plaintiff:

[267]

Lady Pryce was a mere surety for her husband, and having paid off his debt, she and her estate became entitled to be indemnified, and when a party has a right to be indemnified, "he is entitled to interest on every sum he has paid:" *Wainman* v. *Bowker* (1).

Again; a surety is entitled to the benefit of all the securities which the creditor has against the principal, which continue to exist. * * *

(THE MASTER OF THE ROLLS: But where is there any mortgage now? The estate has been sold and conveyed, and the mortgages discharged.)

The money brought into Court, represents the estate, after payment of the mortgage to Earl Temple, the first mortgagee.

Any delay or *laches* which may be said to have taken place is not

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(1) 68 R. R. 116 (8 Beav. 363).

LANCASTER v. EVORS.

imputable to the plaintiff, but to Jaques and Hughes, and the persons claiming under Sir John P. Pryce.

Mr. Kindersley and *Mr. Turner*, *contrà*, for the heir-at-law of Sir John P. Pryce :

* * Here the mortgages have been all discharged, the securities are gone, the estate is discharged, and there remains no right, title, or estate which it is necessary to get in from the mortgagees. * * *

The plaintiff has been so remiss in prosecuting his claim as to be entitled to no favour or encouragement.

Mr. Purvis, in reply :

If a surety pay 1,000*l.* for principal, and 1,000*l.* for interest, it would be most unequitable to relieve the defaulting principal from the burden of paying the interest. It would be offering a premium to a man not to pay his debts, in order to fix his surety with the interest.

The Statutes of Limitation do not run pending the litigation.

* * * * *

May 6.

[269]

THE MASTER OF THE ROLLS :

The plaintiff, having been declared entitled to recover certain sums of money from the estate of Sir John Powell Pryce, has subsequently claimed to be entitled to interest on the sums which he may so recover. But he claims only as a creditor of Lady Pryce, and his claim, as against the estate of Sir John Powell Pryce, rests upon the right of the legal personal representatives of Lady Pryce to be recouped out of his estate certain sums of money which have been paid out of her estate to satisfy his debts; and in respect of such sums of money, I am of opinion, that under the circumstances of this case, the representatives of Lady Pryce would not be entitled to claim interest upon the sums so to be recouped, and the plaintiff resting on their right, is, in my opinion, not entitled to interest upon the sums which he may recover in this suit.

RODICK *v.* GANDELL AND OTHERS (1).

(10 Beav. 270—272.)

1847.
May 22.

Rolls Court.
Lord LANGDALE, M.R.

A defendant before answer became bankrupt. He put in his answer, stating that certain books and letters were in the possession of his solicitor, who claimed a lien on them, and that he could not obtain possession thereof. The COURT ordered the defendant to produce them, with liberty to apply in case of need.

[270]

THE object of this bill was to have effect given to an equitable charge. After the filing of the bill the principal defendants became bankrupts.

They, however, subsequently put in their answer, and admitted that there were in the possession of their solicitor, Mr. Shuttleworth, two pass books; but they said, that the pass books came into the possession of their solicitor, Mr. Shuttleworth, and he claimed and had a lien thereon, for costs incurred by the defendants previous to their bankruptcy; and that they the defendants could not obtain the possession of the said pass books, and ought not to be ordered, as they believed, to produce the same.

The defendants also stated, that there were in the possession of Mr. Shuttleworth copies of various letters, "which copies of letters the defendants were willing should be produced, but on which Mr. Shuttleworth claimed a lien as aforesaid."

Mr. Shuttleworth appeared to be the solicitor of the defendants in this suit.

A motion was now made for the production of the documents.

Mr. Turner and *Mr. R. Palmer*, in support of the motion:

A defendant is bound to produce all documents in the possession of his solicitors or agents; and "though a solicitor may have a lien on a deed for his costs, yet if his client is bound to produce it for the benefit of a third person, so also must the solicitor": *Furlong* v. *Howard* (2); *Brassington* v. *Brassington* (3). A solicitor in the cause cannot be allowed to obstruct the due course of justice, by setting up his lien, and defeat the paramount and independent rights of the plaintiff in the cause. The plaintiff has no means of proceeding against his adversary's solicitor; he must obtain his right to production through the defendant, who is bound to compel his solicitor to do what is right, and "the Court will give him time to take such proceedings as may be necessary": *Taylor* v. *Rundell* (4).

[271]

(1) Cited by Stirling, J., *Lewis* v. *Pinnell* [1897] 1 Ch. 678, 681, 66 L. J. Ch. 463.

(2) 53 R. R. 79 (2 Sch. & Lef. 115).

(3) 53 R. R. 50 (1 Sim. & St. 455).

(4) 54 R. R. 227, 232 (Cr. & Ph. p. 113; 1 Ph. p. 222).

RODICK v. GANDELL.

Mr. Glasse for the bankrupts:

I do not dispute the general rule, that a party is bound to produce documents in the possession of his solicitor, with this qualification, provided they be within the power of the client. If they be not admitted to be in the power of the defendant, the Court never makes the order. * * *

[272] Suppose a bill were filed against an executor, who admitted that documents were in the hands of the testator's solicitor, who claimed a lien thereon, could the executor, having no assets, be compelled to discharge the lien out of his own funds, merely to produce the documents for the plaintiff's convenience?

Again; the property in these documents is vested in the assignees, and the defendants have no right to compel their production.

Mr. Turner, in reply.

THE MASTER OF THE ROLLS:

I will not trouble you further. The defendants are bound to produce these documents if they can; and if they find a difficulty they must come to the Court to give them an opportunity of taking such proceedings against their solicitor as may be proper to compel the production. I cannot think that the solicitor will oppose any difficulty in allowing an inspection of the documents in his possession; and it is to be observed that the objection to production is now made, not by the solicitor, but by the clients.

I must make the order, and leave it open to the defendants to make any application to be relieved if they should be prevented complying with it.

1846. *Dec.* 1.

[277]

BLENKINSOPP *v.* BLENKINSOPP.

(10 Beav. 277—283; S. C. 16 L. J. Ch. 88; 11 Jur. 21.)

[THIS was a motion for production of documents refused at this particular stage of the proceedings, and renewed at a later stage, as reported in 11 Beav. 134—138, when it was again refused; but on appeal the motion was ordered to stand over as reported in 2 Ph. 607, and an order for production was eventually made by the LORD CHANCELLOR, as reported in 17 L. J. Ch. 343. The hearing of the cause is reported in 12 Beav. 568—588.—O. A. S.]

IN RE HARPER AND PARRY JONES.

(10 Beav. 284—291.)

1847.
Jan. 18, 20, 22.
May 3.

Rolls Court.
Lord LANGDALE, M.R.

[284]

An application for taxation of a bill, made fourteen months after its delivery, and before payment, refused, there being no sufficient "special circumstances."

A client gave his solicitor a promissory note, and signed a memorandum of settlement. The Court was strongly inclined to think, that, under the circumstances, it ought to be deemed to amount to payment.

The lapse of twelve months between the time of payment of a bill of costs and the presentation of a petition for its taxation precludes taxation under the Act.

THIS was a petition for the taxation of a bill of costs. It was presented fourteen months after the bill had been delivered, and more than twelve months after a promissory note had been given for the amount. The first question was, whether the giving of the promissory note under the circumstances, amounted to payment; and, secondly, whether there existed sufficient "special circumstances" to authorise the taxation, after so great a delay.

Mr. Turner and *Mr. Glasse*, in support of the petition.

Mr. Roupell and *Mr. C. Hall, contrà.*

Mr. Turner, in reply.

Sayer v. *Wagstaff* (1), *Nokes* v. *Warton* (2), *In re Smith* (3), *In re Whitcombe* (4), 6 & 7 Vict. c. 73, ss. 37 and 40, were cited.

The MASTER OF THE ROLLS said he would consider the affidavits, and he reserved his judgment.

May 3.

The MASTER OF THE ROLLS:

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The petition in this case is presented by John Francis Reynolds, and it prays for the delivery and for taxation *of the bills of costs of Messrs. Harper and Parry Jones against the petitioner.

The bills appear, in fact, to have been delivered on the 29th of November, 1844. The petition, which was brought on for a rehearing, and which has been reheard, was not presented till the 5th of February, 1846, being fourteen months after the delivery of the bills.

The respondents allege, that the bills delivered on the 29th of

(1) 59 R. R. 540 (5 Beav. 415).
(2) 59 R. R. 554 (5 Beav. 448).
(3) 55 R. R. 88 (4 Beav. 309).
(4) 68 R. R. 48 (8 Beav. 140).

In re HARPER.

November, 1844, were paid, or ought to be deemed to have been paid, on the 14th of January, 1845, being more than twelve calendar months before the petition was presented, and further, that even if the bills ought not to be deemed to have been paid in January, 1845, there are not in the case any special circumstances, by which the Court should be induced to direct taxation, so long after the delivery of the bills.

The petitioner was the owner of property, which was subject to great incumbrances, and could not be properly sold otherwise than under the decree of this Court. In the suits which were instituted, orders were made for the taxation of costs; but the respondents did not procure them to be taxed, and costs which were not costs in the cause became due to them, and there was a cash account pending between the petitioner and the respondents.

The petitioner having requested the respondents to deliver to him their bills of costs, incurred in the suits and transactions, and their account of money paid and disbursed by them on his account, they sent to him the bills and account on the 29th of November, 1844. With the bills and accounts they addressed and sent to the
[*286] petitioner a letter as follows: "DEAR SIR,—We at *length send you our bills and accounts in all your business, and we shall be glad to afford you any explanation in our power. You had better, we submit, let Mr. Menlove look over the bills, and we shall be happy to meet you, in any way, where he considers any overcharges to be made, if any there are, of which we are not aware. The taxing of the bill would cost 4 per cent., and therefore they have not been taxed, but it is competent for you to do so. You must consider whether you will sell or borrow on mortgage, for the drafts at bankers are exceedingly expensive affairs."

The Mr. Menlove mentioned in this letter was a solicitor in practice at Ellesmere, and the brother-in-law of the petitioner. He was one of the plaintiffs in one of the suits which had been prosecuted, and had taken an interest in the proceedings.

Whatever may have been the view with which the respondents referred to the costs of taxation, they were just and prudent enough to recommend the petitioner to obtain the advice and assistance of a professional friend and relative, and to inform the petitioner, that it was competent to him to get the bills taxed.

The bills thus delivered on the 29th of November remained in the hands of the petitioner and his friends for about five weeks.

The petitioner seems to have kept them in his own hands for

about three weeks. He says, that on the 19th or 20th of December, he gave them to Mr. Menlove, and requested him to look at them; that Menlove kept them till the 24th of December, and then returned them, stating that he had not been able to examine them. However this may have been, the bills might have been *examined [*287] by this gentleman (who was a solicitor), on the behalf of the petitioner, his brother-in-law. If they were not examined, it was not through any neglect or misconduct of the respondents.

The respondents state, that, on the 24th of December, the petitioner and Menlove called on them, as to the best mode of raising the money due to the respondents; that Menlove then stated, that he had gone through the bills and accounts, and they were perfectly satisfactory and correct. That at this meeting, the petitioner expressed no dissatisfaction with the bills or with the respondents, but instructed the respondents to prepare his will.

This meeting of the 24th of December is not mentioned by the petitioner in his first affidavit; but, in a subsequent affidavit of the petitioner and Menlove, the meeting is not denied, though Mr. Menlove denies, that he ever stated the bills and accounts to be satisfactory, and says, that he did not examine them with a view to report on the correctness and propriety of the charges therein.

From the evidence, I do not think it distinctly proved, that the bills were approved; but it appears to me, that at the distance of more than three weeks after the bills had been delivered, and when the means of payment were under consideration, no fault was found with them.

Again, on the 27th of December, another meeting took place between the petitioner and the respondents. This meeting was attended by Edward Lewis, the father of the petitioner's wife, and Robert Lewis, her brother, and an account of the sums due on mortgage of the petitioner's estate, which had been sent to the petitioner *on the 29th of November, was produced, with the [*288] addition of items, in the handwriting of Menlove. Amongst the items so added, was the sum of 3,428*l.* 5*s.* 5*d.*, the sum claimed to be due by the respondents. At the meeting, it was agreed that the petitioner's estates should be sold, and the respondents say, that it was agreed, that the proceeds of the sale should be applied in payment of their balance. No dissatisfaction was expressed at the bills, and the petitioner executed the will, which had been prepared pursuant to his instructions given on the 24th.

On the 31st of December, there was a meeting between the two

In re HARPER.

Lewises (the father and brother-in-law of the petitioner); and the respondents agreed to deduct the sum of 128*l.* 5*s.* 5*d.* from the amount of their bill, and thus reduce their demand upon the petitioner to 3,300*l.*; and it seems to have been arranged, that there should be another meeting on the 14th of January, and (as the respondents say) that the petitioner should then sign an approval of the account as rendered, and also give the respondents some security for the balance due to them.

From the amount of their demand, from the bill transactions in which he was involved, and the petitioner's want of money, I think, that the petitioner was, to some extent, in the power of the respondents; but, having regard to the manner in which they proceeded, to the time which elapsed, to the reference to Menlove, to the conferences with the petitioner's friends, and to the postponement for a fortnight after the 31st of December, I do not think, that the respondents were, at that time, misconducting themselves towards the petitioner, or exercising any undue pressure upon him. They wrote at the foot of the account a memorandum [*289] to the *effect following: "December 31, 1844. I have perused the foregoing account, and the same and also the bills of costs therein charged have been carefully gone through by my friend and brother-in-law Mr. William Edward Menlove, solicitor; and we are both perfectly satisfied that the same is, in every respect, correct and fairly charged, leaving a balance of 3,428*l.* 5*s.* 5*d.* due from me; but Messrs. Harper and Parry Jones have consented to receive the sum of 3,300*l.* in discharge thereof."

For some reason which is not explained, and on the 7th of January, 1845, Edward and Robert Lewis left at the office of the respondents the bills of costs which had been delivered to the petitioner on the 29th of November, 1844; and on the 14th of January, 1845, the parties met, according to the appointment previously made.

The respondents had reduced their balance, including the amounts of all their bills of costs, to the sum of 3,300*l.*; and the petitioner made and gave to the respondents a promissory note to the effect following, viz.

"3,300*l.* BAGLEY, 31st December, 1844.

"I promise to pay to Messrs. Harper and Parry Jones, or their order, the sum of 3,300*l.* with lawful interest, on demand, for value received. As witness my hand,

"JOHN F. REYNOLDS."

He also signed a memorandum as follows: "Memorandum. In consideration of Messrs. Harper and Parry Jones having accepted my promissory note for 3,300*l.*, in discharge of the balance due to them, I hereby undertake that they shall have a lien on all my *real estates. As witness my hand, this 14th day of January, 1845." In re HARPER. [*290]

The first memorandum, which had been written at the foot of the account, was not signed by the petitioner. The respondents say, it would have been signed, but that the petitioner had, inadvertently, left it at his house at Bagley. The petitioner denies that he said so, and swears, that it was not his intention to sign it; and he further says, that he was induced to sign the promissory note and the memorandum of lien by threats and intimidation.

On consideration of the affidavits which have been filed, and in the absence of any affidavit from Edward and Robert Lewis, I think that there is no sufficient evidence to support the petitioner's allegations of threats and intimidation; and I strongly incline to think, that the promissory note and memorandum, given under the circumstances of this case, ought to be deemed to amount to payment of the bills of costs, and if so, the lapse of a year, between the time of payment and the presentation of his petition, would preclude the petitioner from any right to tax the bills under the Act of Parliament. But supposing that the transaction did not amount to payment, it would still be a question, whether, after so long a time after the delivery of the bills, there are any special circumstances which would entitle the petitioner to have them taxed; and I am of opinion that there are not.

There are many complaints of items contained in the cash accounts, so many and of such a nature, that it is not satisfactory to suppose that they may not undergo a further investigation. But in the bills of costs delivered on the 29th of November, 1844, and not returned till the 7th of January, 1845, there is not one item which is *made the subject of specific complaint, nor any allegation that the return of the bills had prevented the petitioner from specifying particular errors; and it was stated in the argument, and not denied, that the bills had been given back to the petitioner in February, 1846. [*291]

There having been ample opportunity to examine the bills to discover the over-charges, if any, which they might contain, and to procure taxation, and there being in the petition no statement

In re HARPER.

of specific errors, I think that the other circumstances of the case ought not to be considered as special circumstances, authorising me to order taxation under the Act of Parliament.

I must, therefore, dismiss this petition. I shall do it without costs. The bills ought, in my opinion, to have been taxed under the orders in the cause.

1847. *March* 10.

Rolls Court.

Lord LANGDALE, M.R.

[297]

FRANKS *v.* WEAVER (1).

(10 Beav. 297—304.)

The plaintiff invented and sold a medicine under his own name. The defendant also made and sold a similar medicine, and on his labels, he used the plaintiff's name and certain certificates given of the efficacy of the plaintiff's medicine, in such an ingenious manner, as *primâ facie*, though not in fact, to appropriate and apply them to his own medicine: Held, that, although there were other differences in the mode of selling, the proceeding was wrongful, and the defendant was restrained by injunction.

THIS was a motion for an injunction under the following circumstances:

In 1834, the plaintiff Mr. Franks invented a certain medicine or medical preparation, to which he gave the name of "Franks' Specific Solution of Copaiba," and some of the highest medical authorities, having tested its efficacy, gave to the plaintiff certain testimonials in writing, certifying the value and efficacy of the medicine.

He sold the medicine in wrappers, headed "Franks' Specific Solution of Copaiba," which, after eulogising the medicine at some length, contained "general directions for its use," and concluded with copies of the several "testimonials" of the most eminent surgeons.

The plaintiff lately discovered, that the defendant Weaver, who had been appointed one of the plaintiff's agents for the sale of this medicine in the country, had been in the habit of selling another preparation of copaiba of his own.

The labels of the defendant were headed, "Chemical Solution of
[*298] Copaiba," and, after referring to the curative *powers of the balsam of copaiba, it stated, that its nauseous and offensive properties had been removed by Mr. Franks, to whom was due the merit of originally introducing, under the appellation of "Specific Solution of Copaiba," a preparation of the balsam, which was perfectly

(1) *Wotherspoon* v. *Currie* (1872) L. R. 5 H. L. 508, 42 L. J. Ch. 130, 27 L. T. 393; *The Singer Machine Manufacturers* v. *Wilson* (1877) 3 App. Cas. 376, 47 L. J. Ch. 481, 38 L. T. 303.

miscible with water, &c. It then went on to state the merits of "The Chemical Solution," and proceeded as follows: "Mr. Franks' Specific Solution of Copaiba was extensively adopted by the late Sir Astley Cooper, Bart., F.R.S., and was also successfully employed in the public and private practices of the following (as well as many other) distinguished members of the profession, whose testimonials are subjoined: Sir Benjamin Brodie, Bart., F.R.S., Joseph Henry Green, Esq., F.R.S., Bransby B. Cooper, Esq., F.R.S., Members of the Council of the Royal College of Surgeons, London, and also by Alexander Tweedie, Esq., M.D., M.R.C.S., H. A. Cæsar, M.D., M.R.C.S." The directions for use then followed, which were similar to those used by the plaintiff.

Four of the testimonials given by these gentlemen to the plaintiff and included in his wrapper were subjoined *in totidem verbis*, testifying to the merits of Mr. Franks' preparation.

These facts were verified by affidavit, which also stated "that the purpose or design of the defendant, in using or referring, in his aforesaid covers, wrappers, &c., to the plaintiff's name, and to the reputation, qualities &c. of the plaintiff's said medicine and testimonials, was to indicate or imply to the public, or lead them to suppose and believe, that the mixture of the defendant was the same as or of the same or a similar nature, or otherwise to deceive or impose upon the public, and, through false *representations, induce them to purchase, the medicine of the defendant." [*299]

The defendant, by his affidavit, stated, that for many years it had been the practice and custom of himself and other wholesale druggists, to make and vend a solution of copaiba, and that various formulæ for making solutions of copaiba had been published in different medical works.

That for ten years, he had prepared a solution of copaiba in bottles of 20 lbs., on which were pasted a printed paper as stated by the plaintiff, but that he never used any wrapper but plain paper.

He denied the design attributed to him by the plaintiff, and stated, that his sole reason for using the plaintiff's name and his said alleged testimonials was, to show the faculty that his chemical solution of copaiba was of a nature similar to the medicine sold by the plaintiff, and to show the efficacy of a medicine similar to that prepared by the plaintiff, and that a solution of copaiba was used by certain of the faculty whose names were appended to each label. He stated that his said medicine was always sold in a form entirely different to the medicine of the plaintiff, and that he always sold

FRANKS v. WEAVER.

his said medicine in bulk, that is, by the pound, covered with a plain paper; whereas the medicine of the plaintiff was not sold in bulk, but by the bottle, covered with printed wrappers, and that the largest of such bottles did not contain more than three quarters of a pound. That his said medicine was sold at a price less by two-thirds than the medicine of the plaintiff. That he had never sold or attempted to sell his said medicine as or for the plaintiff's medicine, or as an imitation thereof, but that when any customer had

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ordered or enquired for Franks' Specific Solution *of Copaiba, the medicine of the plaintiff had been supplied by him; and that he had publicly sold the said chemical solution of copaiba, as a medicine prepared by him, for several years, in manner and with the wrapper aforesaid, without any concealment or attempt at concealment.

A motion was now made for an injunction, to restrain the defendant from making, vending, &c. any preparation &c., having upon the same, any cover, wrapper, &c., in the terms &c. of the cover, wrapper, &c. used by the said plaintiff, or any other cover, wrapper, &c. containing any testimonial in favour of the plaintiff's medicine, described as "Franks' Specific," &c. or indicating or implying, or tending to induce the public or purchasers to suppose, that such preparation, mixture, &c. was the same as, or of the same, or a similar nature or character as "Franks' Specific Solution of Copaiba," or in which the plaintiff's name was mentioned or referred to, in connection with any preparation, mixture, &c. made, vended, &c. by the said defendant, or in which any use was made of the character and reputation of the plaintiff, or his said "Specific Solution of Copaiba."

Mr. Kindersley, *Mr. Turner*, and *Mr. Hingeston*, in support of the application for the injunction [relied upon the decisions of which *Croft* v. *Day* (1) was the last example].

[301]

Mr. Roupell and *Mr. Martindale*, *contrà*:

This is a case of fair trade competition between two rival solutions. It is shown, that it is a common article of commerce, prepared and sold by all wholesale druggists, and which the plaintiff has no exclusive right to sell. The defendant does not represent that the solution is prepared by the plaintiff: he sells it simply as a "Chemical Solution of Copaiba," not as "Franks' Specific Solution of Copaiba;" and he fairly gives to the plaintiff the credit

(1) 64 R. R. 18 (7 Beav. 84).

of being the first person who had been able to remove the nauseous and offensive properties of the balsam; and this claim he moreover supports by the several testimonials. There is no deception as to the thing to which they are applicable, and there are marked differences in the mode of selling the two articles. The defendant sells in bulk, and the plaintiff in small bottles; the plaintiff uses printed *wrappers and stamps, while the defendant uses none; and [302] the defendant has a label, which the plaintiff has not.

The plaintiff has been guilty of *laches*, and as the injunction depends on a legal right, which is doubtful, the Court ought not to interfere until such legal right has been first determined by proceedings at law: *Spottiswoode* v. *Clarke* (1), and *Perry* v. *Truefitt* (2).

THE MASTER OF THE ROLLS:

Instances of tradesmen endeavouring to obtain an advantage to themselves, by the use of the name and reputation of others, have, unfortunately, of late become too common.

In this case it appears, that copaiba is a substance which is capable of being dissolved in different ways, so that different solutions of it may be prepared. The plaintiff has prepared one solution, which appears to have received the approbation of several medical men, and they have, in different forms, certified the value of that preparation. The defendant has also made a preparation, which he calls a "Chemical Solution of Copaiba." He has a perfect right to do this, and by honest means to procure as extensive a sale for it as he can; and if he had thought fit to sell it by the name of "Weaver's Chemical Solution of Copaiba," or by any other name unconnected with the name of the plaintiff, the plaintiff, at least, could not have complained, for the defendant has a right to enter into a fair competition with the plaintiff, or any one else, in the sale of this article.

The defendant, however, has thought fit to sell and encourage [303] the sale of his own solution, by means of labels or wrappers, in which he employed the name and adopted the directions for use of the plaintiff; he makes a free use of the reputation of the plaintiff, and advertises those letters or certificates which constitute some evidence, such as it is, of the reputation which the plaintiff has acquired. It is very true, that if any one compares the plaintiff's wrappers with the labels used by the defendant, he will find a very considerable difference: the difference is even striking; but it is not

(1) 2 Ph. 154. (2) 63 R. R. 11 (6 Beav. 66).

FRANKS v. WEAVER.

by the similarity of form or the mode of printing that we can get at any result in this case. Again, if any body critically reads the advertisement of the defendant, he will find, that he does not, in direct terms, apply the encomiums given to the plaintiff's preparation to his own; he does not even say, that the preparation he is selling is made by the plaintiff, and yet, for all that, nobody can look at all these things, without observing that the name and the testimonials of the plaintiff are so craftily employed, as to be well calculated to produce, in the minds of ordinary readers, the impression, that the mixture or solution prepared and sold by the defendant is the same as that to which these testimonials are applicable; that is to say, the mixture or solution of the plaintiff.

If this be so, and no person can well doubt it, they are adopted by the defendant for the purpose of acquiring and appropriating to himself these encomiums, which he well knows are applicable to the plaintiff. This then is the common case.

Nobody has been able to define what fraud is, it is so multiform: in this case it consists in the crafty adaptation of these words in [*304] such a manner as to make *it appear that the thing sold is prepared by the plaintiff. It is difficult for any ordinary person not critically examining the labels and the directions for use to derive any different impression; and I am quite persuaded that the defendant intended it. If he imagines that because the similarity is not so great, but that people may possibly find out the difference, or because the label does not contain the name of George Franks, or because the preparation is sold in bottles of a different size and form, that therefore he does not come within the scope of those decisions, he is under a great misconception.

I think that this case falls within the principle of the former decisions, and that the defendant is doing, ordinarily and constantly, that which is calculated to make persons believe, that when he is selling his own article, he is in fact selling the plaintiff's. He does this by using the name of the plaintiff in this particular form. This is a palpable fraud on the plaintiff, which he has no right to commit, and he must therefore be restrained by injunction, so far at least as may be necessary for the protection of the plaintiff, but not further.

The plaintiff has no exclusive right to make the mixture or sell it; the defendant may sell his own mixture, which, for any thing I know, may be quite as good as the plaintiff's, but he must do it in an open fair way: he has no right to use the plaintiff's name. Care

must be taken that the injunction be so framed as not to go further than to prevent the defendant using the name or testimonials of the plaintiff for the purpose of securing to himself an unjust advantage to which he has no title.

FRANKS v. WEAVER.

SEWELL *v.* DENNY.

(10 Beav. 315—317.)

1847. *April* 1.

Rolls Court. Lord LANGDALE, M.R.

A testator devised his real estate to trustees in fee to accumulate until the youngest child of A. attained twenty-one, and then to divide it. After the expiration of twenty-one years, and before the youngest child attained twenty-one, the heir of the testator died: Held, that the forbidden accumulation subsequent to the heir's death, being in the nature of a chattel interest, passed to the personal representatives of the heir of the testator. [315]

THE testator in this case devised his real estate to trustees and their heirs, on trust to manage or receive the rents, and to sell; and he bequeathed to them his personal estate, upon trust, to invest the residue of his property, "in order that the same might accumulate as much as possible, until payable to the legatees thereof, thereinafter mentioned. And upon further trust, that they or he should pay unto each child of his niece, Sarah Sewell, that should live to attain the age of twenty-one years, whether by her then present or any future husband, the sum of 500*l.* sterling, upon his or her attaining that age, without any interest for the same in the meantime. And upon further trust, that they or he should pay and divide the rest and residue of the said accumulated trust fund, unto and equally between all the children of his said niece who should attain the age of twenty-one years, the share of each of them to vest and become a disposable interest upon attaining the said age, but not to be paid or payable until the youngest of them should arrive at that age, and no one of them be remaining living under the same age."

The testator died in 1818, leaving his niece, Sarah Sewell, his heiress-at-law.

In 1829, the twenty-one years allowed by the Thellusson Act (1) for accumulation, expired. In 1845 *Sarah Sewell died, and at the present time her youngest child, born in 1829, had not attained twenty-one. [*316]

A question arose, whether the heir-at-law of Sarah Sewell, or her administrator (her husband) was entitled to the rents of the real

1) 40 Geo. III. c. 98.

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estate accruing after the expiration of the twenty-one years, and before her youngest child attained twenty-one.

Mr. Turner and *Mr. Sidebottom* argued, that the whole excess of accumulation belonged, at first, to the heiress, Sarah Sewell, but, that being a chattel interest determinable on the youngest child attaining twenty-one, she took it as personal estate, and that on her death it passed to her legal personal representative and not to her heir-at-law: *Smith* v. *Claxton* (1), *Levet* v. *Needham* (2).

Mr. Rogers did not dispute that the legal personal representative of Sarah Sewell was entitled to the rents which accrued during her life; but he argued, that the effect of the Thellusson Act was to strike the direction to accumulate out of the will (*Eyre* v. *Marsden* (3)), and to allow the whole excess of accumulation beyond twenty-one years to descend to the testator's heir as realty; and that on her death the future rents retained the same quality of realty, and descended to her heir.

He argued that *Levet* v. *Needham* (2) was not a case under the Thellusson Act, and that there a chattel interest had expressly been created.

Mr. Lovat for trustees.

[317] *Mr. Birkbeck* for other parties.

Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS:

I think the interest taken by the testator's heiress was only a chattel interest.

The testator devised the rents to accumulate until the youngest child attained the age of twenty-one, and the period allowed for accumulation expired before that event. The Act requires you to strike out of the will the excess of accumulation, and the consequence is, that the heir-at-law of the testator takes, as undisposed of, the rents accruing beyond the time allowed and until the youngest child attains twenty-one. But I am of opinion, that this was but a limited and chattel interest, which, on the death of Mrs. Sewell, passed to her personal representative.

(1) 20 R. R. 320 (4 Madd. 484).
(2) 2 Vern. 138.
(3) 48 R. R. 73 (2 Keen, 564; 4 My. & Cr. 231).

NOTE.—By the decree, the accumulations from May, 1839, to March, 1846, were ordered to be paid to Mr. Sewell, the surviving husband and administrator of Sarah Sewell; but he waived, in favour of his children, his right to the future accumulations.

TINK *v.* RUNDLE.

(10 Beav. 318—319.)

1847.
April 17, 28.

Rolls Court.
Lord LANGDALE, M.R.
[318]

A Railway Company without the leave of the Court, took proceedings under the Lands Clauses Consolidation Act, to take possession of lands in the possession of the receiver under the Court. On an *ex parte* motion they were restrained.

THE infant plaintiff was entitled for life to certain freehold and leasehold property which was in the possession of the receiver appointed by the Court.

The South Devon Railway Company being in want of part of the leasehold for their Sutton Pool branch, a petition was presented to the MASTER OF THE ROLLS, who made an order referring it to the Master to ascertain what ought to be done with respect thereto, and permitting the Railway Company to go in and lay proposals before the Master for the acquisition of such land. The solicitors for the Railway Company came in before the Master, and the Master directed the Company to lay a state of facts and proposals before him. Some correspondence passed with respect to the proposals; but nothing was done further before the Master.

Afterwards, the Company required a part of the freehold property for their Mill Bay branch, and, after some correspondence, they stated, "that they found themselves compelled, in order to avoid the most serious injury from the suspension of the works, to resort to the process authorised by the Lands Clauses Consolidation Act, 1845 (1), to obtain possession of the said land."

Accordingly, and without the leave of this Court, they summoned the trustees before the justices, to show cause, *on the 19th day of April, why the justices should not appoint a practical surveyor to assess the value of the land. [*319]

Mr. W. M. James now moved, *ex parte*, for an injunction to restrain the Company from taking proceedings to obtain possession of the property.

(1) 8 & 9 Vict. c. 18, s. 85.

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The MASTER OF THE ROLLS, considering that the Company were interfering with the possession of the receiver without leave of the Court, enjoined the Company "from taking any proceedings towards taking the possession of the piece of land &c. under the Lands Clauses Consolidation Act until further order, with leave for them to move, on Tuesday, the 20th instant, to discharge the order, or obtain any other order as they might be advised to apply for, without further notice to the applicant."

April 28.

The case was mentioned again, when an arrangement was come to between the parties.

Mr. W. M. James for the plaintiff.

Mr. Osborne for the Company.

1847.
March 9.
May 3.

DORMAY *v.* BORRODAILE (1).

(10 Beav. 335—343; S. C. 16 L. J. Ch. 337; 11 Jur. 379; S. C. 5 Man. & G. 639.)

Rolls Court.
Lord LANGDALE, M.R.
[335]

A party covenanted "to do and perform all such acts, matters, and things as should be requisite for continuing and keeping on foot a policy:" Held, that this covenant could not be read negatively, as if he had covenanted to do no act whereby it would become void, and, therefore, that the covenant was not broken by the suicide of the covenantor, whereby the policy became forfeited.

IN 1828, Mr. Borrodaile, in contemplation of his marriage, which was afterwards solemnized, effected a policy of assurance, on his own life, for the sum of 1,000*l.*, in consideration of the annual premium of 93*l.* 15*s.* agreed to be paid. The policy was granted on certain conditions, amongst which was this: that if the grantee "should die by his own hands," the policy should be void.

The proviso was expressed as follows: "Provided and it is hereby declared to be the true intent and meaning of this policy of assurance, and the same is accepted by the said assured upon these express conditions: That, in case the assured shall die upon the seas (except in such passages as are allowed by the rules of the said society), or go beyond the limits of Europe, or enter into or engage in any naval or military service whatsoever (unless license be obtained from a court of directors of the said society), or shall die by his own hands, or by the hands of justice, or in consequence

(1) *Harman* v. *Ainslie* [1903] 2 K. B. 241, 72 L. J. K. B. 533, 88 L. T. 770; reversed, [1904] 1 K. B. 698, 73 L. J. K. B. 539, 90 L. T. 624, C. A.

of a duel, or if the age of the assured does now exceed thirty-six, or if the said assured be now afflicted with any disorder which tends to the shortening of life, or if a certain declaration, bearing date the 20th day of May instant, made and signed by or on behalf of the assured, and forming the basis of the contract *between the said assured and the society, contains any untrue averment, this policy shall be void."

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By indenture of the 26th of June, 1828, Mr. Borrodaile assigned the policy and the money thereby secured to trustees, and he covenanted, amongst other things, that he would "at all times during his life, duly pay all such premiums and other monies, and do and perform all such acts, matters, and things, as should be requisite for continuing and keeping on foot the policy."

On the 20th of March, 1838, Mr. Borrodaile was found drowned in the river Thames, and Abraham Borrodaile proved his will.

The trustees of the indenture having applied, in vain, for payment of the money secured by the policy, commenced an action against the grantors in 1839. The cause was tried at the sittings after Michaelmas Term, 1841, and the jury found, that "the Rev. William Borrodaile voluntarily threw himself into the river Thames, intending to destroy his life; but that at the time of committing the act, he was not capable of judging right from wrong." In conformity with this finding, it was an admitted statement in the case, "that on or about the 16th day of February, 1838, Mr. Borrodaile voluntarily threw himself into the river Thames, intending to destroy his life; but not being capable at the time of distinguishing between right and wrong, and, thereupon, and in consequence thereof, he was drowned and died."

Upon the finding of the jury in the action, a verdict was, under the direction of the Judge, entered for the defendants; *but leave was given to apply to the Court to set aside such verdict, and enter a verdict for the plaintiff for the amount insured by the policy and interest thereon. A rule *nisi* to set aside the verdict was argued in Trinity Term, 1842, and in Easter Term, 1843, the rule was discharged; the Lord Chief Justice TINDAL having, however, expressed an opinion in favour of the plaintiff.

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The trustees having thus failed in establishing their claim against the insurers, endeavoured to establish a debt against the estate of Mr. Borrodaile, upon the covenant, "that he would do and perform all such acts, matters, and things as should be requisite for keeping on foot the policy." This creditors' suit having been instituted for

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the administration of the estate of William Borrodaile deceased, and a decree made therein for taking an account of his debts, a claim for a sum of 1,000*l.* and interest was made by John Watson Borrodaile and others, as trustees of the settlement. The claim was allowed by the Master; but, upon exceptions taken to his report, it was, on the 24th of November, 1845, ordered, that a case should be made for the opinion of the Judges of the Court of Common Pleas, upon the question—Whether the trustees were entitled, under the covenant contained in the indenture, to recover the sum of 1,000*l.*, secured by the policy in the pleadings mentioned, from the executor of the testator? The case was accordingly made and argued before the Judges of the Court of Common Pleas, who certified their opinion, that the trustees of the indenture were not entitled, under the covenant therein contained, to recover the sum of 1,000*l.* from the executor of William Borrodaile.

[338] The case now came on for consideration upon the equity reserved; and the trustees of the settlement desired that the case might be reconsidered at law.

Mr. Kindersley and *Mr. Campbell*, for the plaintiff, supported the certificate of the Judges, and contended that there had been no breach of the testator's covenant, he not having omitted to do or perform any act requisite to keep the policy on foot.

Secondly: that the testator was not responsible for an act done by him when in a state of mental incapacity.

Mr. Purvis for a specialty creditor.

Mr. Toller for the widow.

Mr. Roupell and *Mr. Roundell Palmer* for the trustees of the marriage settlement:

The policy on the life of the testator having been avoided by his act, his estate is liable in damages for the breach of covenant.

A covenant is to be construed according to the intent and meaning of the parties, and no particular form of words is necessary to constitute an obligation by covenant, for "any words in a deed which show an agreement to do a thing, make a covenant": Comyns' Dig. "Covenant" (A. 2). If a party covenant to do every act and deed necessary to preserve a thing, he is, negatively, restricted from doing any act to destroy it. There are many cases in which acts not within the letter of a covenant have still been

held to be within its spirit *and the intention of the parties. "If a man acts contrary to the intention of the covenant, it shall be a breach, though he performs the words of the covenant: as if a covenant be to deliver a recognisance to be cancelled, it is a breach, if he extends it before, though it be afterwards cancelled": *Robinson* v. *Amps* (1). So, if a brewer covenants to deliver all his grains for the cattle of the plaintiff, and he puts hops to them before delivery, it is a breach of the covenant, "because the intention of the parties is to be considered in all contracts; and it was the intent of the parties here, that the plaintiff should have the grains for the use of his cattle, and they will not eat them when hops are put into them: so, if I covenant that I will leave all the timber which is growing on the land I hire, upon the land at the end of the term, if I cut it down, though I leave it on the land, it is a breach of my covenant: so, if I covenant to deliver so many yards of cloth, and I cut it in pieces, and then deliver it, it is a breach of my covenant; for the law regards the real and faithful performance of all contracts, and doth discountenance all such acts as are *in fraudem legis*" (2). Again, in the case of *The Duke of St. Albans* v. *Ellis*, a lessee covenanted to plough &c. the premises, except the rabbit warren and sheep walk, in a due course of husbandry; it was held to be a breach of the covenant, for the lessee to plough up the warren and sheep walk; the Court considering, that the object of the exception was, to "negative the doing thereof; or, in other words, to agree that it should not be done" (3). The same principle of looking to the intent rather than to the strict words applies also to conditions: Comyns' Dig. "Condition," (M. 1).

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Now apply the same principle to the facts of the present case. The testator, by the settlement, intended to make a certain provision for his wife and family, and, for that purpose, effected a policy and covenanted to pay the premiums, and to do and perform all acts, matters and things requisite for keeping the policy on foot. Now what positive acts can be referred to? Not the payment of the premiums, for that is provided for by the express covenant. It must refer to the other acts requisite for keeping the policy on foot: these are contained in the condition for avoiding the policy, and are these: The policy is to be avoided, 1st. If the assured die upon the seas; 2nd. If he go beyond the limits of Europe; 3rd. If he enter into military service; 4th. If he die by his own hand; 5th. Or by

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(1) Sir T. Ray. 25.
(2) No reference in original report.
(3) 14 R. R. 361 (16 East, 352).

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the hand of justice; 6th. Or in consequence of a duel; and, lastly, if the previous statement as to his age, health, or his declaration be untrue. It is plain, that the whole aim and intention of the parties was to provide for the due keeping on foot of the policy; but it will be seen that there is no positive act (except the payment of the premiums) required to be done to keep the policy on foot; but certain acts are specified, on the doing of which it is to be avoided. It is therefore evident, that the covenant applies negatively to those other acts, the infraction of which will avoid the policy, and it amounts to an engagement to refrain from doing them, for unless it does, there is nothing to which it can apply, or on which it can operate. If, therefore, he had gone beyond Europe, or entered the military service, or done any other act, the consequence of which would have been to defeat the policy and frustrate the intention of the parties, he would become liable in covenant.

On the second point, they contended that, by "voluntarily
[*341] throwing himself into the river Thames intending *to destroy his life, though not being capable at the time of distinguishing between right and wrong," the testator had committed a breach of the covenant; for if a lunatic hurts a man, he shall be answerable in trespass, though if he kills him, it is not a felony. On this point they cited 1 Inst. 247, Hawkins' Pl. Cr. 2, *Weaver* v. *Ward* (1), *Owen* v. *Davies* (2), *Hales* v. *Pettite* (3), *Clift* v. *Schwabe* (4), and Viner's Abr. (5).

Mr. Kindersley, in reply.

The MASTER OF THE ROLLS, after referring to the circumstances of the case, and to the extreme vagueness of the expression, "capable of judging right from wrong," said, the difficulty of the case required that he should give it his further consideration.

May 3.

THE MASTER OF THE ROLLS:

It is said, justly, that covenants are to be construed according to the intent of the parties, and then it is argued, that this covenant must be understood negatively, as if it had been, that the grantee would not do any thing by which the policy should be forfeited.

It does not appear to me that I can give this effect to the words

(1) Hob. 134.
(2) 1 Ves. Sen. 82.
(3) Plowden, p. 253.
(4) 71 R. R. 404 (3 C. B. 437).
(5) Lunatic (G.).

of the deed. The subject of the settlement was the policy and the money payable thereon, and nothing else; that which he covenanted to do he did; and there are not, I think, words to which the negative effect contended for can be properly attributed. *From the [*342] object of the settlement and the words of the covenant, I cannot imply an intended obligation not to destroy his own life, or to pay so much money if he did destroy it; and I do not see any sufficient reason for not being satisfied with the opinion certified by the learned Judges.

I think that this case has been embarrassed by the terms in which the jury delivered their verdict, on the trial of the action, and by which the parties have agreed to be bound. I suppose that each party hoped to derive some benefit, in his own sense, from the ambiguity; but I do not think that insanity is the necessary state of mind of a man, who voluntarily does an act which he intends to do, at a time when he is stated in general terms to be not capable of distinguishing between right and wrong.

The expression "incapable of distinguishing between right and wrong" is very frequently employed, without any intention to suggest, that the person to whom it is applied is incapable of distinguishing between right and wrong on any occasion, on any subject, or for any purpose whatever; and it is plain, that a person may be incapable of judging between right and wrong on particular occasions, without being insane, either because he wants the requisite knowledge and experience, or wants reasoning powers equal to the occasion, though quite sufficient to sustain the character of a man of sense and understanding on ordinary occasions, or on occasions less difficult.

My opinion, on the present case, is however wholly independent of the effect of the particular verdict or the special statement in this case, which was adopted from the verdict.

I do not think that the self-destruction of the testator made the [343] trustees of the settlement creditors entitled to establish a debt against the testator's personal estate.

1847.
Jan. 22.
Feb. 1.

Rolls Court.
Lord LANGDALE, M.R.

TUGWELL *v.* HOOPER.

(10 Beav. 348—351; S. C. 16 L. J. Ch. 171.)

Disputes arose between two cestui que trusts in respect of the trust matters, and the trustee acted as solicitor for one: Held, that the communications between the solicitor and his client were not privileged as against the other cestui que trust.

[348] THIS was a motion for production of documents; and the material facts, so far as they appeared on the present occasion, were as follows:

On the marriage of Mr. Hooper, the defendant Mr. Goldney became a trustee of Hooper's property, for securing, in the first place, a debt due from Hooper to Tugwell, and then in trust for Hooper and his family.

After the marriage, disputes arose between Hooper and Tugwell as to the amount of the alleged debt; and, in 1841, Hooper filed his bill against Tugwell and others, to determine the matter in [*349] dispute. Afterwards, Tugwell *filed this cross bill against Hooper, Goldney and others, to enforce the trust and obtain payment of his debt. From the time of the marriage and pending the disputes, and down to July, 1842, Goldney acted as solicitor of Hooper in the matters.

Goldney, by his answer, admitted the possession of certain documents; but he insisted that he was not bound to produce those which had passed between him and Hooper while acting as his solicitor; and he stated his belief, that the correspondence took place in his character of solicitor and not of trustee.

A motion was now made for the production.

Mr. Kindersley and *Mr. Wray* in support of the motion. * * *

Mr. Turner and *Mr. Hardy, contrà.* * * *

Mr. Kindersley, in reply.

THE MASTER OF THE ROLLS:

I cannot help feeling regret at the embarrassing situation in which Goldney has placed himself in regard to these two parties.

[350] A question has been raised whether he was duly constituted a trustee for the plaintiff; but, from the circumstances of the case, as they now appear before me, and the admissions in the answer, I think I am bound, for the purpose of this motion, to consider Goldney as a trustee for both parties. Being so, it appears that,

after the marriage, he became the solicitor of Hooper. I think he placed himself in a situation which a solicitor ought to avoid, when he acted professionally for one of his cestui que trusts, between whom a dispute might possibly and soon afterwards did arise. I am of opinion that this gentleman, who had become a trustee for two parties, could not act separately as the solicitor of one, against the other, having an opposite interest or claim in the matter, and then say, "though I am, and have assumed the duties of, trustee, from which I cannot recede, yet I will voluntarily place myself in such a situation, that I may acquire valuable information for my cestui que trusts in the matters of the trust, which I will conceal from one of them."

I am of opinion, that in respect of the trust matters, he had a clear and undoubted duty to do that which was just and equitable between all his cestui que trusts. He has no right to act exclusively for one, but must rest in a situation of impartiality towards them all.

The question now before me is, whether a trustee can carry on communications respecting the trust matters clandestinely with one of his cestui que trusts, and keep them secret from the others. I have always wished to act on the rules of the Court; and, whatever be the rule established by authority, it is my duty and earnest wish strictly to follow; but no case like the present has been cited, where a trustee has been acting as the solicitor *for one party in the matter. I think, under the circumstances, that there is nothing to excuse the trustee from the production, on the ground that he was the solicitor of one of the cestui que trusts. I do not think that this Court ought to sanction such a concealment of the facts. [*351]

There is no imputation on Goldney, except that he inadvertently placed himself in a situation in which he could not do his duty to all parties. He could not divest himself of his character of trustee, or place himself in the situation of a person acting for one side only. I think that neither he nor his client himself is entitled to protection.

He is bound to produce the correspondence up to the time when he became a party to the suit. It then became necessary for him to protect himself; and I think I ought not to order the production of the communications which took place between him and his solicitor after the institution of the suit.

1847.
Feb. 22, 23, 27.
March 1.
June 19.

Rolls Court.
Lord LANGDALE, M.R.
[402]

THE ATTORNEY-GENERAL *v.* MAGDALEN COLLEGE, OXFORD (1).

(10 Beav. 402—411; S. C. 16 L. J. Ch. 391; 11 Jur. 681; further report, 7 Hare, 564, *n.*)

Upon an information for the reformation of alleged abuses in the management of a school established by the founder of Magdalen College, in connection with it, Held, that the Court had not jurisdiction to give the relief asked. That though there was sufficient proof of the duty or obligation, there was no evidence of a trust, as the word is understood in this Court, and that the proper remedy was through the visitor.

THIS was an information filed by the *Attorney-General*, at the relation of George Parsons Hester, against the president and scholars of St. Mary Magdalen College, Oxford, praying, that the college might be restrained from erecting any buildings on the site of the hall and school in the information mentioned, for their own use. And that it might be declared, that the school founded at Oxford, by William Waynflete, was a public grammar school. And that the president ought to hire and appoint fit and proper persons to be the master and usher thereof. And that the president and scholars might be decreed to provide commons for the master and usher equally with the fellows, and to allow the master and usher proper rooms in the college. And that it might be declared, that the master and usher were entitled to participate in the increased revenue of the college. And that the usher was entitled to a stipend equal to one-half of the stipend of the master. And that the president and scholars might be ordered to build and provide all necessary and convenient buildings for the grammar school on the original site thereof, or to restore the ancient grammar school, and the buildings connected therewith.

The College of St. Mary Magdalen, in the University of Oxford, was founded by William Waynflete, Bishop of Winchester. By a deed-poll or instrument of foundation, dated the 12th of June, 1458, after reciting the King's license then lately given to found a perpetual
[*403] *college of learning and of the sciences of divinity and philosophy, of one president and certain scholars, according to the ordinances and statutes to be made, to be called the College of the Blessed Mary Magdalen, in the University of Oxford, and to be incorporated; and after also reciting that the president of the Hall of St. Mary Magdalen in the same University, and the scholars of the same Hall had granted the site or ground therein mentioned, to the intent

(1) *Att.-Gen.* v. *Dean and Canons of Manchester* (1881) 18 Ch. D. 612, *n.*, 50 L. J. Ch. 562, 45 L. T. 184.

that the intended college might be thereon erected: it was made known or declared, that the founder, William Waynflete, did erect, found and establish, a certain perpetual college of learning of the sciences of divinity and philosophy, in and of the number of one president and certain scholars, graduates learning the same sciences, according to the ordinances and statutes to be framed in that behalf; and he named a president and certain scholars, giving them power to elect and admit others, and to elect and admit successors in case of vacancy. And the founder having thereby made certain temporary regulations for the government of the college, postponed the making of all such other ordinances and statutes as should be necessary and fitting in the premises and not thereby made.

The instrument did not contain any reference to a grammar school, as in any way connected with the intended college, or contemplated by the license in virtue of which the college was founded, and the supplementary statutes and ordinances, which were contemplated by the foundation, were not made for many years. It did not appear when the establishment of a school, as connected with or in the college, was first thought of; but, in the year 1480, certain grammar scholars were taught gratis, at the charges of the founder, in a certain low hall within the college; and, in the month of August, in that year, a building for a grammar school, with *upper [*404] chambers and a kitchen necessary for the school, was begun to be erected; and in the year 1481, and, subsequently, entries in the Libri Computi were found, showing payments of 10*l.* a year to the schoolmaster, and 5*l.* a year to the usher.

It was stated in the information, and also in the answer, that the statutes were finally settled in the year 1483, which appeared to be after the erection of the school, and the employment of a schoolmaster and usher by the college.

By these statutes, the founder established the regulations which were intended for the permanent government of the college; and, thereby, after providing that the college should consist of one president, and such number of scholars as therein mentioned, and establishing many regulations respecting elections, and the duties and conduct of the presidents, scholars, fellows, clerks, chaplains, and ministers, it was expressed as follows: "We enact, ordain, and will, that there be in our college, for ever, one master or informer in grammar, '*conductitius per presidentem pariter et remotivus*,' who is freely and gratuitously, without exacting anything, to inform, teach, and instruct, with the greatest diligence,

A.-G. v. MAGDALEN COLLEGE, OXFORD.

and in the most expedient manner, all persons whomsoever, '*quoscunque accedentes*,' who may attend the grammar school, which is founded and situate hard by our college aforesaid. Also, under the said master, there is to be one usher, engageable and removeable in form aforesaid, '*sub predicta formâ conductitius et remotivus*,' who is freely and gratuitously, and without the demand of anything, to inform and instruct '*dictos advenientes*,' the said persons who attend it, subordinately to the aforesaid master, and, in all things, to take upon himself and supply the duties of the said master, *when the latter is absent. And our will is, that such master be paid 10*l.*, and such usher 100*s.*, out of the common goods of our college, in addition to their chambers and weekly commons, which commons we would have to be equal to those of the fellows of the college," &c.

[*405]

It was alleged by the information, that by this part of the statutes, a grammar school was founded or recognised, and that the terms in which this was done, were such as to impose upon the college a trust to maintain the school, and to support the master and usher in a proper manner; and that the master and usher were entitled to participate with the president and scholars of the college, in the increased revenue of the college.

The defendants seemed doubtful whether they ought to admit, that the school was ever founded, in the proper acceptation of the term; and they denied that it had been founded at all, except in the sense in which the founder says he has founded it in his college; for they said, that the school had no revenue or property of its own, distinct from the college, and that the officers of the same were simply college officers or instructors. They submitted that the stipends of the master and usher were fixed by the statutes, and they denied that the master and usher had any right or claim to such increased yearly salaries as the college had, in fact, allowed them, or any claim to participate in the increased revenue of the college.

They elsewhere said, that the founder had given no property of any kind in trust for the school, or in trust for the master or usher thereof; but had merely directed the payment of yearly stipends to the master and usher; and they submitted, that this Court had no jurisdiction *in the matters in question in the suit, and that the visitor of the college was the proper person to hear and determine such matters.

[*406]

By the statutes, the Bishop of Winchester, for the time being, was appointed visitor, with authority to visit the college, and

convene the president, scholars, and fellows, and, with full power to enquire, whether the ordinances and statutes had been duly executed and observed, and touching all matters concerning the state, welfare, and credit of the college; and, also, with power of duly reforming attempts made against the ordinances and statutes, and of doing all things indispensable in the premises, even though he should chance to take proceedings, for the privation or removal from his administration or office of the president, vice-president, or any other officer whatsoever, or for removal from the college of any fellow or scholar of the college.

The founder was said to have died in the year 1486. He had, for a time at least, supported, at his own charge, a schoolmaster and usher, who, afterwards, received their stipends from the college. On the 28th of June, 1487, during the presidency of Richard Mayhew, the president, not alone, but as it was said, the president and scholars, with one consent, granted to John Anwyhill, the informer of the grammar scholars, in the school adjoining the college, the annual provision of 10*l.*, for the space of a term of fifteen years; and one tenement of the college to be assigned to him, for the same period, at the discretion of the president.

With reference to the practice, as regarded the jurisdictive control of the visitor over the schoolmaster and usher, it appeared, that in the year 1520, Bishop Fox, on his visitation to the college and school, charged the *president with negligence, in respect of [*407] the instruction of the boys in grammar; and, after hearing the answer of the president, admonished the schoolmaster, who was detected or exposed at the visitation, to use more exact diligence about the instruction of the scholars, in sound learning, for the future.

Before the visitations which were held in the years 1576 and 1585, respectively, the visitor issued the usual citation to the president, directing him to summon the persons who ought to be present at a visitation to attend him; and, it appeared, from the answer of the president to the citation, that, on both occasions, the schoolmaster and usher were summoned.

The information now came on for hearing.

Mr. Kindersley and *Mr. Bates* in support of the information.

Mr. Turner, *Mr. Roundell Palmer*, and *Mr. Borrett* for the college, maintained, that the internal management of the school was the exclusive subject of the visitatorial jurisdiction.

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Mr. Kindersley, in reply.

[The cases cited included *The Berkhampstead School* (1), *Attorney-General* v. *Mayor of Bristol* (2), *Attorney-General* v. *Catherine Hall* (3), *Attorney-General* v. *Skinners' Company* (4), *Attorney-General* v. *Caius College* (5), *Attorney-General* v. *Brazen-Nose College* (6), *Philips* v. *Bury* (7).]

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As the clause in the statutes, by which the visitor is appointed and his powers are conferred, does not mention the schoolmaster by name, or by any particular description, it seems, that the visitor could have authority over him only in respect of his being an officer of the college, employed in the performance of a duty imposed upon the college. The duty being imposed upon the college, the visitor had to inquire whether it was duly performed, and reform any abuse; and as far as any evidence is produced, it seems that such was the understanding and the practice.

In the year 1520, Bishop Fox, on his visitation to the college and school, charged the president with negligence, in respect of the instruction of the boys in grammar; and after hearing the answer of the president, admonished the schoolmaster, who was detected or [*409] exposed at the visitation, to use more exact diligence *about the instruction of his scholars in sound learning for the future.

Before visitations which were held in the years 1576 and 1585 respectively, the visitor issued the usual citation to the president, directing him to summon the persons who ought to be present at a visitation to attend him; and it appears from the answers of the president to the citation, that on both occasions the schoolmaster and usher were summoned.

The principal question in the case is, whether this Court, or the visitor, is the proper authority to correct such errors or reform such abuses, as may have been found in the conduct and management of the school.

If, upon the construction of the instruments, the college be trustees for the maintenance of a free grammar school for the use of the public, or of a school for the instruction in grammar of

(1) 13 R. R. 43 (2 V. & B. 134).
(2) 22 R. R. 136 (2 J. & W. 294).
(3) 23 R. R. 92 (Jac. 381, 385).
(4) 26 R. R. 126 (5 Sim. 596; 2 Russ. 407).
(5) 44 R. R. 212 (2 Keen, 150).
(6) 37 R. R. 107 (2 Cl. & Fin. 295).
(7) 1 Ld. Ray. 5. Stated 34 R. R. 134.

all persons who may resort to it, this Court, having jurisdiction to enforce the performance of trusts, and the college being, on the supposition, trustees for this purpose, any breach of trust might and ought to be redressed here, in the exercise of the ordinary jurisdiction of the Court.

But if, upon the true construction of the statutes, the schoolmaster and usher ought to be considered only as officers, appointed and to be appointed by the college, for the purpose of performing the duty of the college, in giving instruction to such persons as might attend them, and the duty of appointing them is no otherwise annexed to the mere property of the college, than by the obligation to pay certain annual sums of money, and is not of the nature of a trust, the execution of which it is within the jurisdiction of this Court to enforce, but the *observance of which, according [*410] to the statutes and ordinances of the founder, is to be regulated and enforced and adequately provided for by the authority of the visitor, then the breach of duty, whatever it may be, ought to be redressed by the visitor, and not here.

The school is not a separate foundation. The license, which the founder obtained to found his college, contained no specific reference to a school, but gave authority to make such statutes and ordinances as were proper for the regulation of the college; and the statutes made to regulate the college, in pursuance of the license, directed, that there should be a schoolmaster and usher, to be hired and removed by the president; in other words, the president had imposed on him the duty of engaging and removing a schoolmaster and usher. Certain stipends are directed to be paid to the master and usher, out of the common goods of the college, and they are to have chambers and weekly commons, equal to those of the fellows of the college; but there is no other endowment of the school. A building was erected for the school, but no property is otherwise specially set apart or appropriated to the use of the school, or for its maintenance and support; and, subject to the specific payments, for specific purposes, including fixed stipends to the master and usher, the revenues of the college belong to the college, for its own use, subject indeed to the performance of all duties incumbent on the college to perform, but not subject to any trust to be executed in this Court.

The college has, no doubt, a very important duty to perform, with reference to the school, and the performance of that duty may be enforced by proper authority; but, unless it be a duty founded

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on a trust which this Court can execute, the performance of the duty is not *to be enforced here. And on the best consideration which I have been able to give to the subject, I am of opinion, that this Court has not jurisdiction to give the relief which is here asked. Though there is sufficient proof of the duty or obligation, there is not, in my opinion, evidence of a trust, as the word "trust" is understood in this Court.

I must therefore dismiss this information, but considering what has been done with the school, as appears by the evidence, and the erroneous view which the defendants admit they have taken of it, and the colour of right under which the information has been prosecuted, I think I shall not do wrong in dismissing it without costs.

The information may have been productive of great benefit, and I have read with satisfaction in the answer, and heard it re-stated at the Bar, that the defendants intend, even without any interposition of authority, to render the school much more efficient and useful than it has for a long time been.

1847. *July* 8, 9, 12, 24.

Rolls Court. Lord LANGDALE, M.R. [412]

FENWICK *v.* GREENWELL.

(10 Beav. 412—422; S. C. 11 Jur. 620.)

Trustees made personally responsible for the consequences of their neglect to enforce a covenant contained in a marriage settlement.

By a marriage settlement it was covenanted and agreed, that 5,000*l.* Consols, part of the wife's property, should be transferred to trustees, upon certain trusts for the husband, wife, and children. At the time of the settlement, a sum of 4,946*l.* was standing in the name of the wife; but the trustees took no steps to enforce a transfer, and it was sold out and misapplied by the husband: Held, that the trustees were personally responsible for the loss; and, secondly, that they were not relieved from their liability, by the trustee indemnity clause, declaring that they should not be liable "for any casual or involuntary loss," without their wilful default, but "for such monies only as should actually come to their hands."

By a marriage settlement, a fund was limited to the husband for life, with remainder to his wife absolutely if she survived; but if she predeceased him, then for all the children of the marriage in such shares as she should appoint; and if there should be no issue of the marriage living at her death, upon trust as she should appoint generally, and, in default, to the husband absolutely, but there was no express gift to the children in default of appointment. The husband survived, and there were children living: Held, that the children, notwithstanding the mother never appointed, were entitled to the fund.

By the settlement made on the marriage of Barnabas Fenwick and Elizabeth Cuthbertson, and dated in 1806, after reciting that

it had been agreed that 5,000*l.*, 3 per cent. Consolidated Bank Annuities, part of the estate and effects of the said Elizabeth Cuthbertson, should be settled upon the trusts after mentioned, and that it was intended that the said sum of 5,000*l.* Bank Annuities should be transferred to William Cuthbertson and William Greenwell (the trustees), in the Bank books; which transfer the said Barnabas Fenwick did thereby covenant and agree to join in, if the same should not be done before the said marriage should take effect; it was witnessed, that it was thereby covenanted &c. between the said parties thereto, that the said 5,000*l.* annuity stock should be transferred to and stand in the names of the said William Cuthbertson and William Greenwell, and that they should stand possessed thereof, in trust for the intended husband for life, and after his decease in case his wife survived him, then upon trust "to assign and transfer" it to her absolutely. But in case she *died in the life of her husband, [*413] leaving children of the marriage living, then immediately on Mr. Fenwick's death, "upon trust for all and every the child or children" of the marriage "in such parts, shares and proportions as she should appoint" (1). And if there should be no issue of the marriage living at her decease, then to such person as she should appoint; and for want of such direction "to assign and transfer" the same to Mr. Fenwick absolutely.

The settlement contained a power for the trustees to alter and vary the trust funds, and a clause declaring that they should not be liable to make good any casual or involuntary loss, which, at any time, might accrue or happen to the said trust money or securities without his or their wilful default, nor be answerable for the other of them &c., but each for his own acts &c. "and for such monies only as should actually come to his and their several respective hands," and not for any money which they should join in transferring or signing receipts for, for conformity only.

The settlement was executed by all parties.

The marriage took effect, and there were several children of the marriage.

About the time of the marriage, a sum of 4,946*l.* 2*s.* 8*d.* 3 per Cents. only was standing in Miss Cuthbertson's name, but the trustees took no steps to compel a transfer; and some years after (in 1815 and subsequently) Mr. and Mrs. Fenwick sold out the

(1) There was no limitation to the children in default of appointment.

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fund and Mr. *Fenwick misapplied it, and afterwards, in 1833, became bankrupt.

[*414] Mr. Fenwick survived his wife and died in 1839, and the power of appointment was never executed by Mrs. Fenwick.

This bill was filed in 1846 by one of the children of the marriage, to make the trustees liable for the 5,000*l.* which had been lost by their neglect to get it transferred into their names.

Greenwell by his answer stated that he had never acted or interfered in the trusts, that he had never read the settlement, and had been wholly ignorant of its purport and effect until very lately.

Mr. Spence and *Mr. Elderton* for the plaintiff and *Mr. James Campbell* for a defendant in the same interest, [cited *Booth* v. *Booth* (1), *Maitland* v. *Bateman* (2), and *Broadhurst* v. *Balguy* (3)].

[415] *Mr. Roupell* and *Mr. J. Humphry*, for the representatives of Cuthertson, and

Mr. Kindersley and *Mr. Faber*, for Greenwell:

First, no obligation was imposed, until the creators of the trust had performed their duty, by placing the fund under the control of the trustees. * * *

[416] Secondly. The power of appointment in favour of the children of the marriage was never executed, and they therefore have acquired no interest in the fund, for the settlement contains no limitation in favour of the children, except through the power of appointment. [They distinguished *Brown* v. *Higgs* (4) and *Burrough* v. *Philcox* (5).]

Thirdly. The trustees are entitled to the benefit of the indemnity clause limiting their liability. * * *

[417] Lastly. The defendants are entitled to an enquiry as to the circumstances. The trustees had no notice of the actual existence of the fund, nor does it now appear that the 4,946*l.* belonged to Miss Cuthbertson, it rather appears to have been part of the estate of Henry Cuthbertson deceased. It does not appear that by any legal proceedings the fund could be recovered, nor were trustees, without funds, bound to embark in litigation.

Mr. Spence, in reply. * * *

(1) 49 R. R. 304 (1 Beav. 125).
(2) 63 R. R. 206 (13 L. J. Ch. 273).
(3) 57 R. R. 212 (1 Y. & C. C. C. 16).
(4) 4 R. R. 323 (reported 4 Ves. 708; 5 Ves. 495; 8 Ves. 561).
(5) 48 R. R. 236 (5 My. & Cr. 73).

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Cases of this description are very painful, and are attended with great hardship on persons suddenly called on, after a lapse of years, to answer for the loss of money which they have never possessed, and which therefore they have not personally misapplied. [418]

The rights of the plaintiff are founded on the settlement executed on the 4th of October, 1806. At the date of the settlement, it was represented on the deed, that Elizabeth Cuthbertson, the mother of the plaintiff, was entitled to a sum of 5,000*l.* 3 per Cents., which was part of her estate and effects; and it was further stated, that the same was intended to be transferred to the persons therein named as trustees and upon the trusts which have been stated. There were powers for the sale of the stock and for making a new investment, and the common form of indemnity against involuntary loss. The indenture was executed by both trustees, and the marriage having been solemnised, the duties which the trustees assumed by the execution of the deed then arose. I am of opinion that they recognised the settlement, and undertook to be liable for the non-performance of the trusts declared by the settlement. The question therefore is, what were the trusts, and whether they could have performed them. A doubt has been raised whether Miss Cuthbertson possessed the 5,000*l.* stock at the time. Now I cannot say that the trustees are bound by the recital of that fact contained in the deed; we have had so many instances of parties representing that they were entitled to particular property, and which representation has afterwards turned out to be wholly untrue, that it would be unjust and dangerous to bind third parties by such representations, and I am not aware, that it has ever been held, that trustees are bound by the representations *of parties about to be married, of the state of their property. I do not, therefore, accede to the argument, that the recital alone binds the trustees. [*419]

Upon the settlement itself, some questions have been raised. It has been said, that the children upon the terms of it, had no interest, in the absence of the execution of the power. I am of opinion, that this argument cannot be sustained.

With respect to the duties imposed on the trustees, it has been argued, that although it is true that the trustees were bound to attend and see, at some time or other, or on some necessary occasion, that the transfer of the stock should be made, yet, as no time was limited for that purpose, the trustees were justified in waiting to ascertain, whether the events might happen, in which

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some persons, other than the husband and wife, might acquire a vested interest. It is said, that Mrs. Fenwick might have survived her husband, in which case, the settlement gave the whole property to her absolutely; or there might have happened to be no children, and no appointment, and then the property would belong to the husband; and therefore, it is said, the trustees are not liable for neglecting to provide for contingencies. I cannot think the argument can be sustained. The trustees were bound to provide for the performance of all and every of the trusts of the settlement, and for that purpose, to provide for all contingencies, so as to be prepared for them whenever they might happen, and be enabled to perform the trusts dependent on them whenever they might arise.

With regard to the time within which the transfer was to take
[*420] place, it was pressed on me, that there was *a great distinction between this and the case of *Maitland* v. *Bateman*, for here no time was limited; I think that the effect of there being no limitation as to time was this, that the duty of the trustees arose immediately. If there had been a limitation of time, they would not have been entitled to take any proceedings until it expired, but there being no limitation of time, their duty arose immediately. I think, therefore, that these parties took on themselves the duty of seeing that the covenant of Miss Cuthbertson and her intended husband was forthwith performed.

Thinking that such was their duty, but that the mere recital in the settlement was not sufficient to inform them that the property was absolutely standing in her name, it remains to be seen what are the other facts of the case. It seems, that before the date of this settlement, three different sums of stock in the Three per Cents., amounting to 4,946*l.*, were transferred into the separate name of Elizabeth Cuthbertson; and that this sum of 4,946*l.* was standing in her name in the books of the Bank of England at the date of the settlement, and at the time of the marriage. Why is it to be supposed that it was not hers? It was there, and it afterwards remained there for a great length of time. The trustees, though they had recognised the trusts by executing the deed, and had become liable for their non-performance, did nothing, they performed no trust whatever, but omitted to pay any attention to the duty which they had undertaken to perform. It appears that this money remained standing in the name of Elizabeth Cuthbertson for a considerable length of time, from October, 1806, to the year

1815. In 1815 part of this stock was sold out, and the remainder was afterwards disposed of. Several transfers were made under powers of attorney executed by Elizabeth the *wife of Barnabas Fenwick, and the whole of this money intended to belong to the trust was withdrawn, and misapplied by the husband, who in 1833 became bankrupt. [*421]

In July, 1837, the wife died, leaving the plaintiff and other children surviving her, who were the objects of this trust, and Barnabas Fenwick the husband died in January, 1839. The plaintiff attained twenty-one in 1841, and after some time, he filed this bill.

The only doubt I have had is, whether the facts are sufficient for me to say, that this sum was either money specially bound by the trust, (which I think was not the case), or whether it is not clearly shown to be a portion of Elizabeth Cuthbertson's property and consequently a fund, which though not specially bound by the trust was capable of being made to answer the trust.

In all cases of this kind, where trustees are sought to be charged with a breach of trust by reason of their omission, the Court takes care to see, before the trustee is charged, that it was within his power to perform the act which it was intended he should do. If this recital as to the wife's property were false, which it might have been, if the trustees believed it to be a false statement, and in consequence it appeared, that they could not perform the trust, this Court would not charge them; if it were to do otherwise under such circumstances, it would be assisting in a fraud on trustees, who had placed a mistaken confidence in the parties for whom they were acting gratuitously. While it is the duty of the Court to refuse to charge trustees for the omission of duties which they were unable to perform, it is a duty to make necessary inquiries where the matter appears *to be doubtful. In this case, however, I cannot [*422] see any sufficient reason to say, that these trustees could not have procured a transfer of the stock which belonged to this lady at the time of the marriage. It is, with some reluctance, that I have come to the conclusion, that these trustees, if they had used due diligence, might have recovered this sum to the extent of 4,946*l.* It is a case of very great hardship; it does not appear that these trustees ever looked into the settlement; but having contracted obligations by the execution of the deed, they attempt to excuse themselves by saying that they were ignorant of the trust. This cannot avail them.

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If the plaintiff abandons all other claims, I will make a declaration that the trustees are answerable for this sum of 4,946*l.*, and the dividends since the death of Barnabas Fenwick, with costs.

EXTRACT FROM DECREE.—Declare the trustees "liable to make good the said 4,946*l.* 2*s.* 8*d.* Bank Three per Cent. Annuities, part of the said 5,000*l.* like annuities in the said indenture of settlement mentioned, and to pay the dividends which might have accrued thereon from the 20th day of January, 1839, the time of the death of the said Barnabas Fenwick, and also the plaintiff's costs of the said suit down to the present time."

MOORE *v.* CLEGHORN (1).

1847. *July* 13, 28.

Rolls Court. Lord LANGDALE, M.R.

Affirmed on Appeal. 1848. *July* 7. Lord COTTENHAM, L.C.

(10 Beav. 423—426; S. C. 16 L. J. Ch. 469; affd. 17 L. J. Ch. 400; 12 Jur. 591.)

Devise to trustees and their heirs "upon trust for the use and benefit of" A., B., and C. (without words of limitation): Held, that A., B., and C., took in fee.

Devise to trustees in fee upon trust for the use and benefit of A., B., and C., the rents to be paid for their maintenance and education, "or to the survivors or survivor of them, share and share alike": Held, that they took equitable estates in fee as joint tenants.

[423]

THE testator Robert Cleghorn, after directing his debts &c. to be paid, "in the first place" devised some freehold and also some copyhold property which he had surrendered to the use of his will, "unto and to the use of Eumenes Moore, George Christopher and James Ensor, their heirs and assigns for ever, upon trust for the use and benefit of his natural mustee boys, Ralph Brush Cleghorn, Thomas Paice Cleghorn, and Matthew Cole Cleghorn, begotten by him on the body of Margaret Steele, a free mulatto woman, of the island of St. Christopher, in the West Indies, the rents, issues and profits to be paid for the maintenance and education of his said before mentioned sons, Ralph, Thomas and Matthew, or to the survivor or survivors of them, share and share alike." And he devised another property to the same trustees for the use of Margaret Steele for life, and at her decease to her children Ralph, Thomas and Matthew or the survivor or survivors of them.

The trustees were appointed executors.

The testator died in 1824, leaving his three natural children surviving. One of them, namely Matthew Cole Cleghorn, died in 1832 without issue or heirs, and the Crown claimed his property

(1) *Yarrow* v. *Knightly* (1877) 8 Ch. D. 736, 47 L. J. Ch. 874, 39 L. T. 238.

(if any) by escheat. A second child, Ralph, died in 1842, after severing the joint tenancy (if any), and Thomas was still living.

A bill having been filed for the administration of the testator's estate, a question arose as to the construction of the devise contained in his will.

Mr. Kindersley and *Mr. Pitman* for the plaintiffs the trustees. [424]

Mr. Turner and *Mr. Stevens* for Thomas P. Cleghorn, contended, that the three children took equitable estates in fee as joint tenants. The limitation to the trustees being in fee "upon trust for the use and benefit" of the natural children, it followed that the interest of the children was co-extensive with that of the trustees: *Knight* v. *Selby* (1), *Bateman* v. *Roach* (2). They argued that the words expressive of joint tenancy prevailed over the words "share and share alike."

Mr. Lloyd for Brooks, claiming under Ralph.

Mr. Wray, for the *Attorney-General*, argued, that the children took legal estates as tenants in common in fee, and he claimed one-third for the Crown; and at all events the intermediate rents, they being of the nature of personalty and held in trust for the Crown: *Middleton* v. *Spicer* (3). He admitted he could not argue against the authority of the case of *Burgess* v. *Wheate* (4).

Mr. Purvis, *Mr. Schomberg*, and *Mr. Bilton* for the heirs of the testator, argued that the legal estate was in the trustees only to apply the rents during minority, that the children took life estates only. * * *

Mr. Briggs and *Mr. Micklethwait* for other parties. [425]

Mr. Turner, in reply, cited *Byng* v. *Lord Strafford* (5).

The MASTER OF THE ROLLS said that the inclination of his opinion was, that they took equitable estates as joint tenants; but he reserved his judgment.

THE MASTER OF THE ROLLS: *July* 28

By the devise to the three trustees their heirs and assigns for

(1) 60 R. R. 469 (3 Scott, N. R. 409).
(2) 9 Mod. 104.
(3) 1 Br. C. C. 201.
(4) 1 Eden, 177.
(5) 59 R. R. 568 (5 Beav. 558).

MOORE v. CLEGHORN.

ever, the whole estate and interest of the testator in the land passed to them: but the testator declared that the gift was "upon trust for the use and benefit" of the three boys. Everything, therefore, which the trustees took was given to them in trust for the use and benefit of the three boys. I think, therefore, that there is no resulting trust to the testator or his heirs.

Next, how are the three boys to take? The first words, the rents to be paid for the maintenance and education of the three children, or to the survivors or survivor of them, are such as would make them joint tenants. The subsequent words "share and share alike" render it doubtful, for they would make them tenants in common.

[426] There is some difficulty in the construction; but, on the whole, I think the boys take equitable estates in fee, as joint tenants.

1848. *July* 7.

[12 Jur. 591]

From this decision the heir-at-law appealed to the Lord Chancellor.

Schomberg, for the heir-at-law, stated that this was a case of first impression; that the position laid down by many text writers to the effect, that where lands are devised to trustees in fee, in trust for a person, without any words of limitation, the cestui que trust takes an equitable interest co-extensive with the legal estate of the trustees, *i.e.* the fee, is not warranted by authority; that the cases of *Challenger* v. *Sheppard* (1) and *Knight* v. *Selby* (2), usually cited in support of the proposition, do not in reality decide the point. (He cited *Bovey* v. *Smith* (3) and *Denn* v. *Gaskin* (4) as authorities in favour of the contention of the heir-at-law; and referred to *Bailis* v. *Gale* (5), *Doe* v. *Parratt* (6), and *Doe* v. *Tucker* (7).) Upon the point of the sons taking as joint tenants or as tenants in common, he cited *Phillips* v. *Phillips* (8) and *Lord Bindon* v. *The Earl of Suffolk* (9).

Rolt and *Stevens*, for T. P. Cleghorn, the surviving son, and in support of the decision of the MASTER OF THE ROLLS, contended, that the Court would fasten on the gift to the trustees in fee, in order to construe the amount of beneficial interest intended to be

(1) 8 T. R. 597.
(2) 3 Man. & G. 92; 3 Scott, N. R. 409.
(3) 2 Ch. Ca. 124.
(4) Cowp. 657.
(5) 2 Ves. Sen. 48.
(6) 3 B. & Ad. 469.
(7) *Id.* 473.
(8) 1 Eq. Cas. Abr. 292.
(9) 1 P. Wms. 96.

given to the cestui que trusts; that the point now raised was decided in the case of *Challenger* v. *Sheppard*, which decision was deliberately recognised and followed in *Knight* v. *Selby*.

Pitman appeared for the trustees.

Schomberg, in reply.

THE LORD CHANCELLOR:

The testator in this case begins his will by directing that his debts shall be paid, but he does not refer to any particular fund for doing this; he then gives certain portions of land to trustees for the use and benefit of his natural boys, describing them, the rents, issues, and profits to be paid for the maintenance and education of these children, or the survivor or survivors of them, share and share alike. Now, two out of the three being dead, the heir-at-law comes here claiming a resulting trust of two thirds, saying that the shares of the children dying were undisposed of. The survivor, however, says, that a fee-simple interest was given by the will, and that, under any circumstances, the heir has no claim. In the view which I take of the case, the observations of the MASTER OF THE ROLLS as to the taking of the boys *inter se* are not material. It is fortunate when the rules of the Court enable the intention of a testator to be carried into effect. It is quite clear here that he intended his boys to take all which he gave to the trustees. Another reason for the gift of the fee to the trustees has, however, been alleged, namely, for the payment of debts, but it nowhere appears that the testator contemplated his debts being paid out of his real estate; the expressions he uses lead to an opposite *conclusion. The other parts of the will are unimportant as to the heir-at-law, where the testator gives a previous estate for life; but it appears that when he does so, he does so carefully. The case comes then nakedly to the question where a testator gives to trustees an estate in fee for the use of others, whether those others do not take an estate in fee. If I had to decide the point in the absence of authority, I should have little difficulty in finding out what the testator meant, but I am not obliged to do this, for I entertain no doubt that the point was decided in *Challenger* v. *Sheppard*, and that the decision was confirmed and acted upon in *Knight* v. *Selby*. Marginal notes are not always to be trusted, but they become important in cases where no reasons for the judgment are assigned, as in *Challenger* v. *Sheppard*. The learned reporter,

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in the marginal note to that case, says, "Where an estate in fee is devised to trustees, in trust for A. B., without any limitation of the estate to the cestui que trust, the latter takes the beneficial interest in fee." Serjeant *Best* argues, on one side, that the devisee took an estate in fee in the premises devised by the testator's will. *Gibbs* argues, on the other side, that the devisee took only an estate for life, because no words of inheritance were added to the devise to him; that the argument of the plaintiff that the beneficial interest that the devisee takes is co-extensive with the legal interest devised to the trustees was untenable, because it tends to show that in all cases where an estate is given to trustees and their heirs in trust, the cestui que trust must take a fee. All this proves that the point now in question was raised and discussed. Of course where anything in the will shows that it is not the intention of the testator that the party is to take the whole beneficial interest, the rule does not apply; but what can be clearer than the intention in favour of the devisee in the present instance, where the gift is "for the use and benefit" of the cestui que trust? The argument, then, in *Challenger* v. *Sheppard* shows what the point decided really was, and that it was as stated in the marginal note. But it is not necessary to rest on this, for in *Knight* v. *Selby* the case came on again, and *Challenger* v. *Sheppard* was cited; and Chief Justice TINDAL says, "This case cannot be distinguished from that of *Challenger* v. *Sheppard* (1), where it was held, that where an estate in fee is devised to trustees, in trust for A. B., without any limitation of the estate to the cestui que trust, the latter takes the beneficial interest in fee" (2), these being the very words of the marginal note in *Challenger* v. *Sheppard*. Thus, then, the Judges have that case cited, concur in the decision, and act upon it. No rule can be, therefore, better established than this is. It cannot be contended that the same question does not arise in the present case.

Schomberg:

In *Challenger* v. *Sheppard*, the trust was to permit A. B. to enjoy the whole.

(1) 8 T. R. 597.

(2) 3 Scott, N. R. 417. The parallel passage in 3 Man. & G. 98, is as follows: "This case cannot, I think, be distinguished from *Challenger* v. *Sheppard*, where it must be taken to have been held, that where an estate in fee is devised to trustees, upon trust, after a certain event, to permit and suffer A. B. to enter and enjoy the whole, without any other limitation as to the interest of A. B., A. B. takes the beneficial interest in fee."

THE LORD CHANCELLOR:

This means the whole of the thing given, not the whole of the interest; the word "whole" describes the property, not the interest. The present is a clear case, and the decision below was right. The appeal must therefore be dismissed.

BATEMAN *v.* HOTCHKIN (1).

1847. *July* 14, 26.

(10 Beav. 426—435; S. C. 16 L. J. Ch. 514; 11 Jur. 809.)

Rolls Court. Lord LANGDALE M.R. [10 Beav. 426]

A testator devised his real estate in strict settlement, subject to a term of 2,000 years, limited to trustees for raising 500*l.* a year, and accumulating it as a sinking fund for payment of his mortgage debts, &c. to a considerable amount: Held that the trust, though unlimited in its duration, was valid.

The general rule that specific legatees of personal estate, and devisees of real estate shall contribute rateably where contribution is required for payment of debts may be excluded by the testator's express direction that the personal estate is to exonerate the real estate.

THOMAS HOTCHKIN, by his will, dated in 1843, directed that all his just debts, funeral, and testamentary expenses should, in the first place, be fully paid and discharged out of his personal estate, exclusive of leasehold tenements, if the same should be sufficient for that purpose; and if not, then he thereby charged his real estate with such deficiency, and directed the same to be raised under the term of 2,000 years thereinafter created for that purpose. He then gave and bequeathed to his son Thomas Henry Stafford Hotchkin all the furniture and other things in his will described, which, at the time of his decease, should be in or about his dwelling-houses.

After further bequeathing as therein mentioned, he devised his manors, lands and real estates, including settled hereditaments, to the intent therein mentioned: To the use of trustees, their executors, administrators and assigns, for the term of 2,000 years, to be computed from the day of his decease, upon trust, by mortgage, sale or other disposition of the said hereditaments, or any competent part thereof, for all or any part of the *term, to [*427] raise such sum of money as should be sufficient to make up the deficiency, if any, of his personal estate, except leasehold tenements, for payment of his debts, other than debts on mortgage, and also, by like ways and means, to raise and pay the several sums therein mentioned. And upon further trusts, out of the rents and profits of the devised estates (after answering the

(1) *Tewart* v. *Lawson* (1874) L. R. 18 Eq. 490; *Norton* v. *Johnstone* (1885) 30 Ch. D. 649, 55 L. J. Ch. 222.

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purposes before provided), to pay and keep down all interest on mortgage debts; and subject as aforesaid, that the trustees should yearly, until a sufficient fund should be raised to pay and discharge the mortgage debts, by and out of the residue of the rents and profits of the devised estates, raise and set apart the clear yearly sum of 500*l.* sterling, as a sinking fund for the discharge of the mortgages, and should, in the month of July in each year, lay out the said yearly sum or sinking fund of 500*l.*, in the purchase of stock, or at interest on Government or real securities, and, from time to time, alter or vary such securities when expedient. And he directed, that the dividends, interest, and annual produce of the stocks or funds to be, from time to time, produced by such investments, and the resulting income thereof, should be again, from time to time, laid out, so as to form a fund accumulating at compound interest. And as to the monies to be raised and produced by such investments, he directed the trustees to stand possessed thereof, upon trust to convert the same into money, and with the proceeds thereof, to pay off and discharge the mortgages.

Provided always, that it should be lawful for the trustees to pay off any of the mortgages, when a sufficient fund should be raised, without waiting for the termination of the period of accumulation.

[428] And he directed, that so much of the rents of the estates as should not be wanted for all the purposes aforesaid, should be paid to or received by the person for the time being entitled to the estates comprised in the term in remainder immediately expectant thereon. And there was a proviso, that when the said trusts should be performed or become unnecessary or incapable of taking effect, the term of 2,000 years should cease and determine.

Subject to the term, the testator devised the estates therein comprised to his son for life, with remainder to trustees to preserve contingent remainders, with remainder to his grandson Thomas for life, with remainder to trustees to preserve contingent remainders, with remainder to the first and other sons of the body of his grandson Thomas in tail male, with other remainders over.

The testator bequeathed his leasehold estates to his trustees, for his interest therein, upon and for such trusts, intents, and purposes as would best or nearest correspond with the uses and limitations before declared concerning his real estate before devised.

The testator bequeathed a number of different chattels to his son specifically.

The testator died in June, 1848, at which time his debts were

stated to amount to 72,000*l.*, and they had been since increased. The personal estate not specifically bequeathed was wholly inadequate to pay the testator's debts. In November, 1844, this suit was instituted by the trustees for the administration of the estate. BATEMAN v. HOTCHKIN.

Mr. Kindersley and *Mr. Prior*, for the plaintiffs, stated the case.

Mr. Turner and *Mr. Rogers*, for the testator's only son, who was tenant for life, raised two points: [429]

First. The trust of the term of 2,000 years for raising and accumulating 500*l.* a year for payment of the mortgage debts is void for remoteness, or as tending to a perpetuity. The period during which this accumulation is to last is wholly indefinite; and, if valid, it might last for centuries. In the present case, according to the calculations made, it would take 53 years at compound interest, and 150 at simple interest, to pay off the mortgages and complete the trust. The consequence of sanctioning such a trust will be to allow an estate to be fettered with a discretionary trust for an unlimited period, which, since the term is prior to the estate of the tenant in tail, could not be barred by him (1). A trust to pay debts out of the rents and profits of an estate is valid, because it charges the *corpus* of the estate; and, in order to perform the trust, the Court would direct a sale, but here there is no such power; and the tenant for life and the tenant in tail together, could not compel a sale of the estate to discharge the mortgages.

[They cited *Lord Southampton* v. *The Marquis of Hertford* (2), *Marshall* v. *Holloway* (3).]

Secondly. The real estate ought to be applied in payment of the testator's debts prior to the specific legacies; in other words, the real estate is primarily liable. On this point [*Tombs* v. *Roch* (4), *Spong* v. *Spong* (5), *Young* v. *Hassard* (6), and other cases, were cited]. [430]

Mr. Teed, *Mr. Hodgson*, and *Mr. James Campbell*, for the children of the tenant for life:

First. The trusts of the term of 2,000 years are perfectly valid. They amount to a mere severance of two portions of the estate: a

(1) See *Case* v. *Drosier*, 44 R. R. 363 (2 Keen, 764; 5 My. & Cr. 246).
(2) 13 R. R. 18 (2 V. & B. 54).
(3) 19 R. R. 94 (2 Swanst. 432).
(4) 70 R. R. 293 (2 Coll. 490).
(5) 32 R. R. 16 (3 Bligh, N. S. 84).
(6) 58 R. R. 335 (1 Dr. & War. 638).

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sum of 500*l.* a year charged on the estate during a term, being given for the benefit of one set of persons absolutely, and the remainder of the estate settled in strict settlement. [On this point they cited *Bacon* v. *Proctor* (1).]

[431] The 39 & 40 Geo. III. c. 99, s. 2, expressly provides, "that

[*432] nothing in that Act contained shall extend to any *provision for payment of debts of any grantor, settlor, or devisor, or other person or persons."

Secondly, the debts are a primary charge on the personal estate specifically bequeathed, for the testator expressly directs, that his just debts &c. "should, in the first place, be fully paid and discharged out of his personal estate, exclusive of his leasehold tenements, if the same should be sufficient for that purpose." Property is not the less personal estate, because it is specifically bequeathed.

Mr. Nevinson, *Mr. Terrell*, and *Mr. R. Moore*, for other parties.

Mr. Turner, in reply.

The MASTER OF THE ROLLS reserved judgment.

July 26. THE MASTER OF THE ROLLS:

For the testator's eldest son, who is the tenant for life of the estates subject to the term of 2,000 years, and who is also specific legatee of the furniture and other things in or about the testator's dwelling-house, it is contended:

First. That the trust for raising and accumulating a sinking fund for payment of the mortgages is void for remoteness, or as tending to a perpetuity, and,

[433] Secondly. That the specific legacies ought to be exonerated from the payment of the testator's debts.

With regard to the term and the trust for accumulation, it may be observed,

First. That the debts, for the payment of which the accumulation is directed, are mortgages either existing at the testator's death, or made pursuant to his will; charges on the estate of an amount ascertained or to be ascertained in the execution of valid trusts.

Secondly. That the amount compared with the rents of the property comprised in the term is so great, that the accumulation of rent, managed as the testator has directed, would not be sufficient

(1) 23 R. R. 177 (T. & R. 31).

to pay the mortgages till after the lapse of very many years, too long if considered as an absolute term for accumulation.

Thirdly. That the mode in which the testator has limited the estate, subject to the term, is not liable to any objection. The first tenant in tail attaining twenty-one years of age may acquire absolute dominion over the estate, subject to the mortgages.

Fourthly. That on that event taking place, the trustees of the term will become trustees for the owner of the estate, who may deal with the term and with the estate at his own discretion, subject only to the mortgages. Without the consent of the owner of the estate, the trust for accumulation cannot continue beyond the time during which the law permits a suspension of full power over the estate. The period during which the attainment of full power over the estate is suspended is permitted *by law; and the accumulation, except at the will of the owner, can continue only during that lawful suspension: and considering this case to be within the exceptions of the statute, it does not appear that I can hold the term and the trust for accumulation to be void for remoteness. [*434]

I think this a very improvident and indiscreet mode of raising money for the payment of debts, but it does not appear to me to be unlawful. The inconvenience of it may, perhaps, be mitigated, by the exercise of the discretionary power of the trustees, to apply any portion of the accumulated fund in satisfaction of mortgages, before the accumulated fund is sufficient to pay all, or by the exercise of the power, which the mortgagees have, to enforce payment of their mortgages or foreclose the estate, without regard to the trust for accumulation.

With respect to the second point, I consider it to be settled, that if there be specific devises and specific legacies, and a deficiency of general assets to pay debts, the specific gifts, whether real or personal, must be made to contribute rateably to the deficiency; and, as between different objects of his bounty or different purposes intended to be answered by his will, the testator may exonerate his personal estate from the charge of his debts. But the present case depends on the peculiar expressions used in the will, and the construction which ought to be put upon them. Now, the testator directs, that all his debts and funeral and testamentary expenses shall, in the first place, be fully paid out of his personal estate (exclusive of leasehold tenements), if the same shall be sufficient, and, if not, then he charges his real estate with such deficiency, and directs the same to be raised under the term of 2,000 years.

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[*435]

He then gives specific legacies to his son, *and afterwards, in declaring the trusts of the 2,000 years' term, he directs his trustees to raise such a sum of money as shall be sufficient to make up the deficiency, if any, of his personal estate (except leasehold tenements) for payment of his debts, other than debts on mortgage. It is so explicitly directed, that the debts are to be paid out of personal estate (exclusive of leaseholds), and that the deficiency, if any, is to be paid by means of the term, that it does not appear to me practicable, to put upon the words, expressing the direction, the construction, that the testator intended, with the leasehold tenements, to exclude the personal estate specifically bequeathed, and though I am afraid that that which may or would have been the real intention of the testator, if he had well considered what he was doing, may be defeated, I think that he has, by the words he has used, not only directed payment out of his personal estate, but excluded the general rule as to contribution to be made by specific devises and specific legacies.

1847.
July 21, 22, 23, 28.

Rolls Court.

Lord LANGDALE, M.R.

[444]

EGG *v.* DEVEY.

(10 Beav. 444—450; S. C. 16 L. J. Ch. 509; 11 Jur. 1023.)

The plaintiff deliberately and with full notice, accepted the benefits under his mother's will, which "prohibited" him from setting up any claim, on account of any "error, irregularity, or impropriety" in the execution of the trusts of her father's will: Held, that he could not maintain a suit against the executor of the father's will, to make him accountable for the profits made by the employment of part of the trust funds in his business.

IN 1793, the first testator John Daniel Salamon died, having by his will given 600*l.* and one fourth of the residue to his daughter Mrs. Egg for life, with remainder to her children living at her death, of whom the plaintiff was one.

John Salamon was the acting executor, and between the years 1811 and 1818, he sold out part of the trust funds, and employed the produce of the sale in his business.

The plaintiff, one of the children of Mrs. Egg, became aware of this misapplication, at least in 1834, but took no steps to obtain redress.

John Salamon the executor died in 1840, having bequeathed a legacy of 100*l.* only to the plaintiff, his nephew, who being thus disappointed in his expectations, complained of the breach of trust committed by the executor, and threatened to take proceedings to make his estate liable.

Mrs. Egg, his mother, who was then living, had made her will, by which she had left her residuary estate to the plaintiff and his brother, and she, hearing of the claims and threats of the plaintiff, her son, made a codicil to her will, dated the 17th of May, 1842, which was as follows: "This is a codicil to my will. I declare my full approbation of the manner in which the trusts of my late father John Daniel Salamon, have been executed, *and I prohibit every [*445] person entitled to any benefit under my will, from setting up any claim on account of any error, irregularity, or impropriety in the execution of the above mentioned trusts, or in any way relating thereto; and I authorise and direct the executors and trustees of my will, for the time being, to give, and from every person entitled as aforesaid to require, every such release and discharge as they shall think proper or expedient, for fully effecting the objects of the above declaration and prohibition."

Mrs. Egg died in November, 1843. The plaintiff was dissatisfied with the provision made for him, and a correspondence, respecting his claims and rights, took place between him and her executors, who were also executors of John Salamon. A letter, written by the plaintiff to the executors on the 5th of August, 1844, contained this passage. "At present I am not inclined to accept my grandfather's legacy, but as you offer to pay me now my mother's legacy, no doubt you are aware her codicil is mere waste paper, therefore you cannot claim a receipt with unlawful conditions annexed; but, to save us all trouble, perhaps you will send me a copy of the receipt you will require, any time before November next, as I can then consult my legal adviser."

The answer of the defendant, the executor, was as follows: "I am not inclined to take advantage of your want of legal knowledge, though your confident tone is calculated to excite such an inclination. If you mean to consult any legal adviser, you had better do it now, and before your acceptance of your mother's legacy has rendered all consulting quite useless. Ask him, whether, if a codicil to a will directs that a legatee shall release an actual debt owing to the legatee by some *other person, the mere acceptance of [*446] the legacy would not effectually bar the legatee's right to the debt. Then ask, whether the same consequence would not follow, if the codicil directed a release of certain claims (I mean real claims instead of a debt), and then, whether the legatee's right would be at all strengthened by the claims being merely imaginary. I say nothing about the respect due to the solemn declaration of your

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mother's wish on this subject. I am willing to save you the expense of a deed of release, which the codicil authorised the executors to require, and, therefore, you will not at present be required to execute such a deed. The codicil gives sufficient power to require a release, at any time, before or after you have received the legacy; but if not required before, your liability to pay the expense of it, would not be so clear as it is now. You will be required to sign the common printed form of receipt obtained at the Stamp Office, for all that is included in that, and a common receipt for any thing more, and to sign a statement of the account expressing that you have examined and approve of it." In November, 1844, the plaintiff having full knowledge of his rights, and of the effect of accepting the gifts under his mother's will, received from the defendants, F. N. Devey and F. W. Devey her executors, who were also executors of John Salamon, his share of his mother's residuary estate; and he gave a legacy receipt, in the ordinary form, for the same, but he executed no release.

Afterwards, the plaintiff instituted this suit for an account of the estate of the first testator John Daniel Salamon, and (amongst other special relief) sought to charge the estate of John Salamon with the profits made in his trade by the employment of the first testator's money therein.

[447]

Mr. Turner and *Mr. J. H. Palmer*, for the plaintiff:

John Salamon, the executor, having employed the testator's assets in his business, became liable to account for the profits made thereby. This principle is now clearly established: *Docker* v. *Somes* (1), *Wedderburn* v. *Wedderburn* (2), *Willett* v. *Blanford* (3).

Secondly. The plaintiffs right is not defeated, either by the codicil to his mother's will, or by any thing which has since taken place. The effect of the codicil is not to create a condition, but to declare a mere prohibition, and there being no gift over, it is insufficient to work a forfeiture. It is *in terrorem*, similar to a prohibition against alienation or against marriage without consent, and is unavailable. If it really amounted to a condition it would be void, as it tends to oust the jurisdiction of the Court, and to prevent its affording relief in a case of breach of trust.

Thirdly. No delay or *laches* is attributable to the plaintiff; he was justified in not filing his bill until after the death of the tenant

(1) 39 R. R. 317 (2 My. & K. 655).
(2) 44 R. R. 331 (2 Keen, 722; 4 My. & Cr. 41).
(3) 58 R. R. 61 (1 Hare, 253).

for life, *Mehrtens* v. *Andrews* (1); and as his interest was contingent, he might have lost his costs by applying earlier to the Court: *Hay* v. *Bowen* (2).

Mr. Kindersley and *Mr. Hallett*, for the principal defendants, admitted that the plaintiff was not barred by the lapse of time, but contended that he was only entitled to the common accounts of the estate. They insisted, that the codicil imposed on the plaintiff a binding condition, and that if he thought fit to elect to take *under [*448] the will, the condition was perfectly effective in law: *Taylor* v. *Popham* (3), *Vernon* v. *Bethell* (4), *Webb* v. *Webb* (5). That the plaintiff having deliberately accepted the benefits under his mother's will, with full notice of the consequences, and after having been advised by her executors not to accept the bequests without advice, was bound to perform the condition, and could not now renounce the gift coupled with the condition: *Attorney-General* v. *Christ's Hospital* (6), *Messenger* v. *Andrews* (7).

That though the plaintiff pretended that he had recently discovered the breach of trust, yet it was evident that he had had notice of it before 1818, when he was clerk to John Salamon in the business, and had access to the books, in which it appeared; and that it was clear from his own letters, that he had notice in 1834, for he therein expressly complained of these very breaches of trust.

That though the plaintiff had executed no release, still he was equally bound by the acceptance of the benefits under his mother's will, evidenced by the receipt given on the occasion.

Mr. Beavan, for the defendant Rose.

Mr. Turner, in reply.

Knatchbull v. *Fearnhead* (8) was also cited.

THE MASTER OF THE ROLLS: [449]

I cannot assume that the plaintiff, who was a clerk in the business, and had, probably, access to the books, had, therefore, notice of the breach of trust now complained of; but, it is proved, by his own letters, that he had notice in 1834. He does not appear to have made any complaint, during the life of John Salamon. After his

(1) 52 R. R. 34 (3 Beav. 72).
(2) 59 R. R. 577 (5 Beav. 610).
(3) 1 Br. C. C. 168.
(4) 2 Eden, 110.
(5) 1 P. Wms. 132.
(6) 32 R. R. 302 (3 Br. C. C. 165; 1 Russ. & My. 626).
(7) 28 R. R. 156 (4 Russ. 478).
(8) 45 R. R. 230 (3 My. & Cr. 122).

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death, he disclosed his views, and threatened litigation, and this appears to have induced his mother to make this codicil.

Mrs. Egg died in November, 1843, and the contents of her codicil was immediately communicated to him. The executors could only get complete indemnity through this Court, and they might, at the expense of the estate, have instituted a suit for that purpose; and they might also have insisted on a release from the plaintiff; but, acting for the benefit of the estate, and, to avoid the expense, they refrained from doing so. If ever a warning were necessary to executors, they would find it in the grateful return made by this plaintiff. He says, "you omitted to require a release from me, though authorised so to do by my mother's will, and, therefore, I am entitled to prosecute this claim against you, though your omission was to save me expense."

It appears that the plaintiff, having full knowledge of the codicil, and of the effect of it, having been desired to act under legal advice, and having had from August to November, for the purpose of taking that advice, deliberately, in November, takes the money under his mother's will, and signs the receipt for it. The question is not so much, whether the prohibition itself will have the operation of barring the plaintiff, but, whether the receiving the benefits

[*450] under the will, knowing the *prohibition, had not the effect of preventing him prosecuting this suit, for the special relief which he now asks: that is, whether having deliberately accepted the money he ought not to be considered as having waived that part of the claim which he endeavours to enforce by this bill.

He may be entitled to the common accounts; but the only question is, whether he is to have any special directions. I will look into the case.

As to the case of *Wedderburn* v. *Wedderburn*, which has been alluded to, I think the practical working of that decree is enough to make any prudent man startle.

July 28. THE MASTER OF THE ROLLS:

In this case, I have considered the codicil to the will of Mrs. Egg, and the several cases cited, and also the case of *Tattersall* v. *Howell* (1),

(1) 2 Mer. 26, where a bequest was made of interest to a legatee on condition that he changes the course of life he has too long followed and will give up all his low company and frequenting public-houses entirely. The MASTER OF THE ROLLS decided that the condition was a valid condition and capable of being enforced, and directed an enquiry whether the condition had been complied with.—O. A. S.

and I am of opinion that the codicil sufficiently expresses a condition, such as this Court will give effect to. I think, that the plaintiff, having accepted the benefits given by the will of his mother, is bound by the condition thereby imposed on him, and is not entitled to make any claim against the estate of John Salamon, in respect of his employing the assets of John Daniel Salamon in the trade he carried on from 1811 to 1818.

I think it right, therefore, to direct the common accounts to be taken of the estate of John Daniel Salamon, and I must dismiss, with costs, so much of this bill as seeks for the special accounts and enquiries.

OUSELEY *v.* ANSTRUTHER.

1847. *March* 5, 6, 9.

Rolls Court. Lord LANGDALE, M.R. [453]

(10 Beav. 453—463.)

A testator devised all his real property to trustees, upon trust, in the first place, subject to the payment of his funeral expenses, of any debts, and of the annuities and pecuniary legacies thereinafter bequeathed, for his son for life, with remainders over in strict settlement. And, after giving certain annuities and legacies, and after giving his furniture, wines, and stores to his wife for life, and an annuity of 440*l.*, out of his real and personal estate, he bequeathed to his son "all his personal property, after his mother's decease, except" some plate: Held, that the personal estate was not exonerated from the payment of the debts, &c.

A testator, after reciting inaccurately, that his wife was entitled for life to 39,000*l.* settled on his marriage, which he stated would, at 4 per cent., yield 1,560*l.*, directed his trustees to add an annuity of 440*l.* to raise his wife's jointure to 2,000*l.*: Held, that the widow was entitled to have her annuity made up to 2,000*l.* at all events (1).

A. B. invested a sum of money, which was subject to the trusts of his marriage settlement, in the purchase of a real estate, and he added a sum of 500*l.* of his own: Held, under the circumstances, that he had devoted this sum to the trusts of the settlement for the benefit of the parties entitled thereunder.

A library of books held to pass, upon a general intention that the testator's house should not be dismantled, but kept up for his family.

SEVERAL points arose in this case, but it is thought more convenient to report them separately.

The case was argued by,

Mr. Kindersley and *Mr. Sidebottom*, for the plaintiff, Sir F. A. Gore Ouseley.

Mr. Tinney and *Mr. Walpole*, for the widow.

Mr. Turner and *Mr. Rasch*, for the daughters.

Mr. Kyle, for the trustees.

(1) See *ante*, p. 121.

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Mr. Kindersley, in reply.

The material circumstances, as to the first point, were as follows:

The testator, Sir Gore Ouseley, Bart., by his will without date, expressed himself as follows: "I give and devise all my real property to the use of Sir Ralph Anstruther and Sir Walter R. Farquhar, their heirs and assigns, upon the trusts following, namely, upon trust, in the first place, subject to the payment of my funeral expenses, of any debts unpaid at the time of my death, of my beloved wife's jointure, as hereinafter specified, and the annuities and pecuniary legacies hereinafter bequeathed, in trust for my beloved son Frederick Arthur Gore Ouseley and his assigns during his life, without impeachment of waste; and after his
[*454] decease, *in trust for the first son and his male issue of the said Frederick Arthur Gore; and in default of issue male of the said first son, in trust for the next and every other son successively, according to seniority of birth of the said Frederick Arthur Gore, and the heirs male of the body of each son in strict entail; (unless my said trustees to this will, seeing that several large debts to me owing, and amounting to upwards of 100,000*l.*, still remain unpaid, they, with the consent of my said son Frederick Arthur Gore, cut off such entail to disembarrass him from the expense of so large an establishment as the house and grounds at Hall Barn Park require, sell the estate belonging to me in Buckinghamshire, and reinvest the amount of such sale in purchase of land elsewhere, with a smaller house; such land when purchased to be equally strictly entailed as the Hall Barn Park estate)." "Failing such issue," the testator devised the estate in manner therein mentioned.

He then bequeathed some legacies and annuities, and directed 440*l.* a year to be paid to his wife, from his real and personal estate (1), and he proceeded in the following words: "I further direct and wish my beloved wife to consider Hall Barn Park house, garden, furniture, and the wines and stores in it as appropriated for her own use, for her life or until she may choose to resign it to my son Frederick Arthur Gore, free of all rent or hire, so as to make her income of 2,000*l.* more consonant to my tender affection for her, and more suitable to her wants and those of our dear children. I give and bequeath to my beloved son Frederick Arthur Gore all my personal property for his absolute use after his mother's

(1) The clause is stated, *post*, p. 178.

decease; except the gold enamelled plate, presented to me by his late Majesty Fateh Ali Shah, King of Persia,"* &c., which he directed should be an heir-loom. He appointed the trustees his executors.

[*455]

Under this disposition, it was contended by the son, that the testator had given him the personal estate, exonerated from the payment of his debts, legacies, annuities, funeral, and testamentary expenses, which were a primary charge on the real estate.

On this point the following [among other] authorities were referred to: *Blount* v. *Hipkins* (1), *Greene* v. *Greene* (2), *Michell* v. *Michell* (3), *Driver* v. *Ferrand* (4), *Jones* v. *Bruce* (5), *Tower* v. *Lord Rous* (6), *Bootle* v. *Blundell* (7), *Irvin* v. *Ironmonger* (8), *Boughton* v. *James* (9).

THE MASTER OF THE ROLLS:

I do not think you can collect from this will, any thing like an intention that the personal estate should be exonerated. The testator devises his real property to his trustees, upon trust, in the first place, subject to the payment of any debts, and the annuities, and pecuniary legacies. This is not like a devise of real estates upon trust, to sell and make such payments, followed by a specific gift of all the personal estate. It is a devise subject to these debts, which, before the Act, would merely have thrown upon the real estate a burthen which would otherwise have fallen on the personal estate only.

Then follows a bequest of "all his personal estate," except the gold plate, after the death of the widow. What did he mean by "all his personal estate?" He clearly did not mean every thing with the exception only of the plate, for he must have had regard to what he had already given to his wife, and amongst other things, to her annuity, which, under some circumstances, might have exhausted the principal part of his personal estate.

[456]

If any ambiguity exists, the Court must look at the intention to be collected from the other parts of the will, and my present impression is, that he did not intend to exonerate his personal estate from his debts, so as to charge them exclusively on the real estate. However, I will look at the authorities cited, and if I alter my opinion I will express it.

(1) 40 R. R. 74 (7 Sim. 43).
(2) 20 R. R. 284 (4 Madd. 148).
(3) 21 R. R. 280 (5 Madd. 69).
(4) 32 R. R. 315 (1 Russ. & My. 681).
(5) 54 R. R. 347 (11 Sim. 221).
(6) 11 R. R. 169 (18 Ves. 132).
(7) 15 R. R. 93 (1 Mer. 193).
(8) 34 R. R. 156 (2 Russ. & My. 531).
(9) 1 Coll. 26. On appeal, see 73 R. R. 116 (1 H. L. C. 406).

OUSELEY v. ANSTRUTHER. *March* 9.

THE MASTER OF THE ROLLS:

I see no reason to alter the opinion I have already expressed; that there is not, on this will, sufficient to exonerate the personal estate. From the general scope of the will I collect an intention to the contrary.

* * * * *

[459] The next question arose on the following clause of the will:

"3. With the limited means to which my fortune has been reduced, by the failure in the first place of Joseph Queiros, &c., I regret, most deeply, that I cannot add to the jointure allotted to my best beloved wife, H. Georgina, in our marriage settlement, in [*460] the manner *which I had intended before those losses occurred. It was my wish at least to have doubled it, and God knows, that the non-fulfilment of that wish does not arise from any diminution of my tenderest affection, ever since our happy union &c. It will be seen, by our marriage settlement, that she is entitled for life to the interest of the following sums for her jointure (viz.), 30,000*l.* settled by me, and 9,000*l.* settled by her father, the whole of which was invested in part purchase of the Hall Barn Park estate in 1832. This sum of 39,000*l.* at 4*l.* per cent. interest, would yield my beloved wife an annuity only of 1,560*l.*, I therefore direct my trustees to add to the above annuity the sum of 440*l.* per annum, from my real and personal estate, so as to raise her jointure thus to 2,000*l.* per annum."

The testator also expressed himself as follows:

"I further direct and wish my beloved wife to consider Hall Barn Park house, garden, furniture, and the wines and stores in it, as appropriated for her own use, for her life, or until she may choose to resign it to my son, Frederick Arthur Gore, free of all rent or hire, so as to make her income of 2,000*l.* more consonant to my tender affection for her, and more suitable to her wants and those of our dear children."

The representation of the testator, of his having settled 30,000*l.*, and of his wife's father having settled 9,000*l.*, was inaccurate; the fact being, that Sir G. Ouseley had settled 33,264*l.* Consols of the then value of 20,000*l.*, and had given his *post obit* bond for 10,000*l.*; and his wife's father had settled 10,000*l.* Reduced, of the then value of 6,000*l.*, and these sums, with the exception of the 10,000*l.*, had been sold out, and the produce invested, as before stated.

[461] The question arising under these circumstances was, whether, in the event of the 440*l.* being insufficient, with the interest on the

trust funds, to make up 2,000*l.*, Lady Ouseley was entitled to have the 440*l.* increased, so as, in all events, to secure her 2,000*l.* a year. It was stated, that she did not, in any event, require more.

As to this it was said, that there was a mere mis-description of the funds, and a miscalculation as to the amount of interest which it would produce, and that this would yield to the testator's anxious intention to provide for his widow an income of 2,000*l.* a year. *Milner* v. *Milner* (1), *Trevor* v. *Trevor* (2), were cited on this point; and see *Jordan* v. *Fortescue* (3).

The MASTER OF THE ROLLS held that the widow was entitled to such an annuity as with the interest would yield 2,000*l.* a year.

By the marriage settlement of the testator, dated in 1806, 33,264*l.* 3 per cent. Consols were settled on certain trusts for the husband, wife, and children of the marriage; and the settlement contained a power to lay it out in the purchase of lands.

In 1807, a part of this sum was sold out, and the produce, together with 500*l.*, belonging to the husband and not subject to the trusts of the settlement, was laid out in the purchase of a real estate called Claramont. *This estate was conveyed to the trustees [*462] of the settlement, but no notice appeared to have been taken of the fact, that part of the purchase money had been advanced by the husband.

Upon the death of the surviving trustee, a suit was instituted to appoint new trustees; and by the decree made in 1830, reciting the settlement and purchase deed of 1807, it was referred to the Master to appoint new trustees; and it was ordered, that the estate should be conveyed, which was done accordingly. The Claramont estate was, in 1834, sold, and the produce received by Sir G. Ouseley.

Nothing more appeared to have been done as to the sum of 500*l.*, and these facts being undisputed, a question arose on the death of Sir Gore Ouseley in 1844, whether the 500*l.* belonged to his estate and whether he had any lien or claim in respect thereof. The Master found that his estate was entitled to the 500*l.* and interest, but exceptions were taken to his report.

THE MASTER OF THE ROLLS:

I am of opinion that the testator devoted this sum of 500*l.* to the

(1) 1 Ves. Sen. 106.
(2) 29 R. R. 6 (5 Russ. 24).
(3) *Ante*, p. 121.

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trusts of the settlement. It was an advancement to the parties entitled under it. In a case like this, where the father of a family makes a purchase for the purposes of his marriage settlement, I should require very strong evidence to show that he did not intend it for the benefit of all parties entitled under it.

[*463]

Another question arose, whether under the gift to Lady Ouseley, the testator's library, of 3,500 volumes, *passed. [On this point *Cornewall* v. *Cornewall* (1) and other cases were cited.]

The MASTER OF THE ROLLS held they did, not from the force of any particular word in the gift, but from an apparent intention on the will, that the house should not be dismantled but kept as a residence for his widow and children.

1847.
June 10, 11.
July 12.

Rolls Court.
Lord LANGDALE, M.R.
[465]

WOOD *v.* THE MARQUIS OF LONDONDERRY.

(10 Beav. 465—472; S. C. 16 L. J. Ch. 460; 12 Jur. 735.)

Lands were subject to a lease of a way-leave at a certain rent for sixty-three years, which the lessee had the power of determining. The land and rent were sold separately by auction in two lots, and were purchased by two different persons. After some time, the purchaser of the land entered into an arrangement with the lessee, to put an end to the lease, and entered into a different one, in order to defeat the right of the purchaser of the rent: Held, that this was contrary to equity, and the right of the purchaser of the rent was made good out of the new contract.

BY articles of agreement, dated in 1823, John Hutton agreed to grant to the Marquis of Londonderry, a way-leave from his collieries over the Wardenlaw and Deanhouse farms, for a term of sixty-three years, from May Day, 1823, at a rent of 400*l.* a year, and 3*l.* an acre to the tenants of the estate for the ground damage in making the road. And "the lessee was to be at liberty to give up at the end of any year of the term, on giving twelve months' notice."

The property was copyhold, held under the see of Durham, and license to demise could not be obtained for a longer period than twenty-one years.

The road, called the Seaham Railway, was accordingly made over this and other property, but no lease had been granted at the death of Hutton.

In 1828 Hutton died, and a suit being afterwards instituted for the administration of his estate, a lease was granted to the Marquis

(1) 56 R. R. 61 (12 Sim. p. 303).

of Londonderry, under the direction of the Court, for the term of twenty-one years, from the 13th of May, 1823; and the lease contained a power to the lessee of surrendering his lease at the end of any one year of the term, upon giving twelve months' notice in writing to the persons entitled to the rents of the lands over which the way-leave extended. The lease recited the agreement for a lease for sixty-three years, and though it contained no covenant for *renewal at the end of twenty-one years, so as to complete the sixty- [*466]
three years, yet there appeared to have been no waiver of the right.

Hutton's property was sold by auction in the suit. Lot 11, consisting of the Wardenlaw farm, was purchased by the defendant Gregson; and as to this lot, the particulars of sale stated as follows: "The purchaser of this lot is to take the same subject to, and will be entitled to the benefit of, the reservations and covenants contained in the lease of the Seaham Railway, so far as the same relates to the property comprised in this lot, or to the tenants or occupiers thereof; but the vendors reserve for sale, by separate lot, the rent reserved for way-leave by the said lease."

Lot 12 was purchased by the plaintiff, and was described as follows: "Lot 12. The annual sum of 182*l.*, part of the yearly rent of 400*l.*, paid by the Marquis of Londonderry for way-leave, for the produce of his collieries, over the Wardenlaw farm, lot 11, and part of the Deanhouse farm, lot 7, and secured by a lease granted to him in 1832, for a term of twenty-one years, commencing the 13th day of May, 1823. The lessee has a power of determining the lease at the end of any year of the term, on giving twelve months' notice; and in the said lease is contained a recital of an agreement for two further terms of twenty-one years each, making the full term of sixty-three years."

At the end of the conditions of sale there was a note or statement as follows: "The leases of the way-leaves referred to in the foregoing particulars will be produced, and may be inspected, at the time of sale."

The Wardenlaw farm was conveyed to the defendant Gregson, and the 182*l.* a year was assigned to the *plaintiff, for the residue [*467]
of the term of twenty-one years granted by the lease, "and also during the said two further terms of twenty-one years mentioned in the same lease, so as to make up the full term of sixty-three years contracted for by the articles of agreement," and the assignment was made subject to the power to the Marquis to determine the lease.

WOOD v. THE MARQUIS OF LONDONDERRY.

The lease for twenty-one years expired on the 13th of May, 1844, and Gregson obtained a license to demise to the Marquis of Londonderry for a further term of twenty-one years. On the 23rd of May, 1844, he entered into an agreement with the Marquis of Londonderry for granting "a renewed lease of way-leave" over the Wardenlaw farm for sixty-three years, for all coals and other mineral produce, by whomsoever and out of whatsoever collieries wrought, and also for colliery and harbour materials, and for goods, merchandise, and general traffic including passengers. The certain rent was fixed at 252*l.* per annum, for the privilege of leading 250,000 chaldrons of coals (53 cwt. each), and a tentale rent, after the same rate, was to be paid for all coals led, exceeding such annual quantity; colliery and harbour materials, goods, merchandise, and general traffic to go rent free. The lessee was to have liberty to terminate the lease at the end of the 10th, or any subsequent year of the term, on giving twelve months' notice. The existing agreement, dated 8th May, 1823, entered into by Hutton for granting a way-leave to the said Marquis over the lands above mentioned, and other lands for a term of sixty-three years, from May Day, 1823, at a certain rent of 400*l.* for the whole distance, was to be terminated either by surrender or notice. "The lessor was to take upon himself and to hold the lessee harmless against the claims of the parties entitled, by purchase from the [*468] trustees of or otherwise *under Hutton, to the rent made payable by the said agreement of the 8th May, 1823."

After this agreement, Gregson refused to pay Wood any portion of the rent reserved for the way-leave, on the ground that this was a new agreement, and not a continuance of the old one, which had been put an end to. After a considerable correspondence, the plaintiff, on the 9th of April, 1846, filed this bill, insisting on his right to a continuation of the payment to him of the 182*l.* out of the rent now received from the Marquis of Londonderry, and praying a declaration of his right to the annual sum of 182*l.*, for the remainder of the sixty-three years, or so long as the Marquis should use the way-leave over the property, or until it should be given up and duly determined, according to the terms of the agreement of 1823, and for consequential relief.

After the filing of the bill, and on the 25th of April, the solicitor of the Marquis of Londonderry gave notice to the plaintiff that the Marquis had entered into a new agreement with Mr. Gregson, dated the 23rd of May, 1844, whereby that of 1823 had been

superseded; and though advised that it was unnecessary to give him notice, yet, by way of precaution, he did give notice that such agreement had determined; and that if it could not be determined without notice to him, then he thereby gave notice, that the same should determine, at the earliest period thereafter, that the Marquis could determine the same.

The cause now came on for hearing.

Mr. Turner and *Mr. Toller*, for the plaintiff, contended that the new arrangements entered into after the expiration of the lease, were but a scheme and contrivance *to deprive the plaintiff of the [*469] benefit of his purchase, and to transfer the 182*l.* from the plaintiff, who had paid for it, to the defendant, who had bought subject to it.

That the surrender was merely pretended and colourable, for the road had never been given up by the Marquis of Londonderry, who continued to hold it under the original agreement of 1823. And as to the notice, that it was insufficient, and not given until after the institution of this suit.

That Gregson having purchased, with full notice of the plaintiff's rights, and expressly subject to them, could not, in equity, exercise his power over the estate in such a manner as to defeat the plaintiff's right to the rent of 182*l.* a year, and acquire it himself; for if he had such a right at the expiration of the lease, he would have the same right the day after the plaintiff had paid 1,200*l.* for the purchase of the rent of 182*l.* That this would be manifestly contrary to every principle of equity, as the defendant had, in consequence of the reservation of the rent of 182*l.*, given so much the less for the estate.

That the plaintiff, had, therefore, an equity to have his rent of 182*l.* satisfied out of the rent now payable by the Marquis of Londonderry for the way-leave.

Mr. Roupell and *Mr. Faber*, *contrà*, for the defendant Gregson:

The plaintiff can attach no equity upon the benefits reserved by the agreement of 1844. He bought expressly subject to the right of the lessee to surrender the lease, and without any covenant or obligation on the part of Gregson to renew it for his benefit. He was entitled to the 182*l.* so long only as the Marquis *of London- [*470] derry enjoyed the way-leave under the agreement of 1823. That has been put an end to, and the road is now held under a different agreement, varying in its terms from that of 1823, and not limiting

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the leave to coal. Again, there is no privity of contract between the plaintiff and Gregson.

By the particulars of sale, the vendors reserved only "the rent reserved for way-leave by the said lease;" therefore, at the expiration of the lease, the reservation expired.

Mr. Kindersley and *Mr. C. Hall*, for the Marquis of Londonderry, took no part in the discussion.

Mr. Turner, in reply.

[*Giddings* v. *Giddings* (1), *Randall* v. *Russell* (2), *Hardman* v. *Johnson* (3) and other cases, were cited.]

THE MASTER OF THE ROLLS:

It seems to be quite certain, that Mr. Gregson, with his eyes open to all the difficulties of the case, and with the determination of defeating, if possible, any interest which the plaintiff may have, has adopted this course of proceeding at all risks, and with clear warning of the consequences.

The only question is, whether he has a right to defeat the plaintiff's rights, for his own purpose, in the way he has attempted.

[*471] Notwithstanding the nature of *the agreement of 1823, it seems to me, having regard to the situation of the parties, to the mode in which the property was disposed of, to the way in which they became entitled to it, and to the events that afterwards took place, that this ought to be considered as a subsisting right for the whole length of time comprised in that agreement; and, if that be so, then the question is, whether one party having certain lands and rights, is so to deal with the Marquis of Londonderry, as to defeat entirely the right of the other. That the defendant intended to do it, if he could, is too clear. He meant to take advantage of his position, if he could, to oust Mr. Wood from any right he had, and to procure that benefit for himself.

How then did the matter stand on the expiration of the lease? There was not the least obligation on the part of the lord of the manor to grant the licences on which the renewal of the leases altogether depended. There was not the least obligation on the part of the Marquis of Londonderry not to put an end to the lease. So that the interests of the plaintiff were subject to be entirely

(1) 27 R. R. 78 (3 Russ. 241).
(2) 17 R. R. 56 (3 Mer. 190).
(3) 17 R. R. 95 (3 Mer. 347).

defeated by a lawful act or the lawful exercise of power, both of the Bishop of Durham and the Marquis of Londonderry; but, subject to these conditions, these parties were connected in the way that has been stated. Then, the defendant, seeking for his own profit at the expense of the plaintiff, and notwithstanding the conditions of his own purchase, attempts to defeat the agreement of 1823, by entering into an agreement for that very purpose. I think that he had no right to do so.

I cannot go the length of saying that the agreement could not be put an end to without carrying into effect the provision, that the ground should be restored to the original state; for that was a covenant entered into by the *lessee for the benefit of the land- [*472]
owner, who might have waived it if he had thought fit.

Here, the defendant Gregson, availing himself of his position with the Marquis, and of his situation as owner of the land, put an end to the first agreement entirely for his own benefit, and enters into this new agreement immediately after. He took his chance; and my opinion is, that he has not been successful, and that he is not entitled to maintain the new agreement exclusively for his own benefit. He has attempted, contrary to equity and good conscience, to abuse his power as purchaser of the land, in order to defeat the right of the plaintiff in respect of the same land, in a manner that this Court cannot allow.

There must be a decree for the plaintiff with costs. The words in which the declaration is to be framed require some consideration.

ABSTRACT OF DECREE.—Declare plaintiff's right to the 182*l.* did not determine on the expiration of the term of twenty-one years, granted by the lease of 1823; but that on the expiration thereof, the plaintiff continued to be and is entitled to the said annual sum, during such term (not exceeding sixty-three years from 1823), as the Marquis of Londonderry has and shall hold the said way-leave under the agreement of 1844.

Direct payment accordingly, with costs.

SANDERSON *v.* DOBSON.

1847. *July* 17.

(10 Beav. 478—484.)

Rolls Court. LORD LANGDALE, M.R.

[SEE the decision upon the will here in question reported under the title of *Dobson* v. *Bowness* (1868) L. R. 5 Eq. 404.]

[478]

1847.
Aug. 2.

Rolls Court.
Lord
LANGDALE,
M.R.
[485]

IN RE THE MERCHANT TAILORS' COMPANY.

(10 Beav. 485—487.)

Under an Act of Parliament, a corporation took lands for public purposes. The Act empowered the Court to order the costs, charges, and expenses of reinvesting the compensation-money to be paid by the corporation. On a fourth application, to re-invest the residue amounting to 63*l.*: Held, that the proceeding was not so vexatious as to disentitle the party to the costs.

UNDER the powers contained in the 2 & 3 Vict. c. cvii. (local and personal), a part of the property of the Merchant Tailors' Company was taken by the Corporation of London, and the purchase-money was paid into Court, and invested in 5,247*l.* stock.

By the Act, the Court is empowered to order "the costs, charges, and expenses" of reinvesting the money in the purchase of other hereditaments, "together with the necessary costs, charges, and expenses of obtaining the proper orders, and of all other proceedings for such purpose," to be paid by the Corporation of the city of London (1).

On the 12th of January, 1844, the sum of 3,111*l.* part of the 5,247*l.*, was invested in the purchase of some property.

On the 16th of July, 1844, a further sum of 925*l.* was in like manner applied.

On the 19th of December, 1846, a further sum of 1,100*l.* was similarly applied, and there remained a sum of 63*l.* in Court.

[486] It had since been referred to the Master to ascertain whether a proposed purchase of other property, adjoining that belonging to the Company, was a proper purchase wherein to invest the 63*l.*, and to enquire whether a good title could be made. The Master reported in the affirmative; and a petition was now presented for payment of the 63*l.*, and that the costs, charges, and expenses might be taxed and paid by the Corporation of London.

Mr. Baggallay, in support of the petition, cited *Ex parte The Provost, &c. of Eton* (2).

Mr. Randell opposed the payment of costs, arguing, that it was most unreasonable and oppressive to put the corporation to the expense of four applications, when one would have been sufficient: and he contended that it was a grievous hardship on the respondents, to create such an expense respecting so small a sum as 63*l.*

(1) Sect. 37.

(2) 3 Rail. Cas. 271.

THE MASTER OF THE ROLLS:

The Act of Parliament has enabled the corporation to take other persons' property, whether they consent or not, upon paying them a compensation, which the party has the option of investing in land, at the expense of the corporation. It is thought right to make those who, by Imperial power, take the property of others without their consent, pay the expenses of the reinvestment of the compensation money. The question now raised is not new. It has frequently been urged before me, that, where there have been several investments, the costs ought not to be paid. It would be a very poor compensation for the property taken *away, if the party were obliged to bear the expense of placing it out again. If I found this power used, not for the fair legitimate purpose of the petitioners, but vexatiously to harass the other parties, I should take care that they should not succeed in that object.

[*487]

But is it possible to lay down any rule? to say, that you must wait until you find one convenient purchase to invest the whole money, or that any particular number of purchases are to be made; that one or two purchases must be obtained, which will exhaust the whole fund, and at the same time be convenient purchases for the persons whose land has been taken from them?

I will grant that this power of investment at the expense of others may be vexatiously used; but when the case occurs, it will be corrected. I cannot say, because there have been three or four applications, that, therefore, the proceeding is so vexatious, that I ought to deprive the petitioners of one of the consolations given them by the Act, for the loss of their property taken from them against their will. If they have not improperly contrived to leave this small sum in Court, I cannot say that the proceeding is vexatious, and deprive them of their costs.

This point has been very frequently under my consideration, and I have always expressed the same opinion. Show a case of vexation, and the Court will exercise the power which I think it has to prevent it.

1847.
May 4.

Rolls Court.
Lord
LANGDALE,
M.R.

[511]

ANDREWS *v.* BOUSFIELD.

(10 Beav. 511—516.)

A., on her marriage, assigned a debt due to her from B. to three trustees, upon trust, when requested by her to call it in and invest it, and hold it in trust for A., her husband, and children. B., with full notice but without such request, paid part of the money to the husband by order of the trustees, and other part to the trustees for the express purpose of being advanced to the husband in breach of trust. The money was lost: Held, that B., as well as the trustees, was responsible for the breach of trust.

In 1824, the defendant Mr. Andrews intermarried with Sarah Sims. At that time, Sarah Sims was entitled to a sum of 700*l.*, then in the hands of her uncle, the defendant Bousfield.

By the settlement made on their marriage, she assigned the 700*l.* to Sims, Bullock and Page, upon trust, when thereunto requested by Sarah Sims by any writing under her hand, to call in, compel payment of, and receive from Bousfield, the 700*l.* and invest the same upon Government or real security, and to hold the same for Mr. and Mrs. Andrews for their respective lives, and afterwards for their children.

After the marriage, notice of the settlement was served on Bousfield, and he was furnished with a copy. The money was subsequently paid over to Andrews, under the circumstances after stated, and 500*l.* was lost by his insolvency. The object of this bill, filed by the children, was to make, not only the trustees, but Bousfield, liable for the loss which had occurred.

The defendant Bousfield stated, that after the marriage, he had given to the trustees a promissory note for the amount due from him, and that in September, 1829, Sims and Bullock, or one of them, applied to him for payment of 100*l.*, part of the said trust-money, in order that they might pay over the same to the defendant Andrews, and that he, Bousfield, according to the best of his

[*512] recollection and belief, thereupon told *the party or parties so applying to him, that the trust-money ought not to be so employed, and that the trustees or trustee replied, that the trustees had a right to call for payment of the amount due on the said note or any part of it, when they thought fit, and that he, Bousfield, had nothing to do with the matter. That on the 2nd of December, 1829, he, Bousfield, paid the sum of 100*l.*, part of the principal sum due from him on his said promissory note, on the authority of an order in writing signed by the said trustees, to the party who presented the same to him for payment, who was, to the best of his remembrance and belief, the defendant Andrews; that such

order was as follows: "LONDON, 18th September, 1829, Andrews' trust money. Messrs. BOUSFIELD,—Please to pay the bearer 100*l.*, and debit this account with the same 100*l.* EDWARD BULLOCK, JAMES PAGE, WILLIAM SIMS, trustees."

Bousfield subsequently paid two other sums of 100*l.* to Sims, and 50*l.* to Sims and Bullock, leaving 250*l.* due from him; and as to this he stated as follows: "That in the month of August, 1840, Sims applied to him for payment of the sum of 250*l.*, being the residue of the trust-money due on the said promissory note; and that he, believing that it was the intention of Sims and Bullock to pay over the said sum to the defendant Andrews, or to apply it in some way for his use, remonstrated strongly with Sims on the impropriety of so doing; and upon being pressed for payment by Sims, who insisted upon the right of the trustees to call for payment thereof, the defendant refused to pay the same, until he had received due notice, according to the tenor of the promissory note. That Sims thereupon sent to the defendant a notice in writing signed by him, in the words and figures following: '29th August, 1840. Mr. C. P. BOUSFIELD. SIR,—We hereby give you notice, that we *shall require the 250*l.*, for which we have got your promissory note, on account of Mrs. Sarah Andrews; for EDWARD BULLOCK and Self, W. SIMS, trustees for Mrs. Sarah Andrews.'"

[*513]

That on the 31st of October, 1840, Sims demanded payment of the said sum of 250*l.* pursuant to the said notice, and he, Bousfield, thereupon paid the sum of 250*l.* to Sims, and received back the promissory note, with a receipt for 250*l.*, signed by Bullock and Sims indorsed thereon.

He also stated, that he paid the sum of 250*l.* because it was duly demanded by the parties to whom it was legally due on the promissory note, and in order to discharge his debt on the note; and that he supposed and believed that William Sims intended to pay over the same to Andrews, and he endeavoured, as far as lay in his power, to prevent him from so doing. And he said, that the said sums of 100*l.*, 100*l.*, 50*l.*, and 250*l.*, making together the sum of 500*l.*, were paid to or to the order of the trustees by him, without any request or authority in writing from or by the said defendant Sarah Andrews to him; but he submitted and insisted, that he was not bound to enquire whether the trustees had or not obtained such authority in writing, and that, being a debtor to the trustees on his promissory note, he was bound to pay the amount thereof to them when required, and that he had himself a right to pay off the said

ANDREWS v. BOUSFIELD.

debt whenever he pleased, and that the trustees were the proper persons to receive and give discharges for the same, and that he was in no way accountable for their misapplication thereof.

The principal question in dispute was, as to the liability of Bousfield.

[514] *Mr. Turner* and *Mr. G. L. Russell*, for the plaintiffs:

Bousfield had not only notice of the settlement, but he was furnished with a copy of it. He became fully aware of the trusts, and, amongst them, that the money was not to be called in, except on the written request of the wife. The moment he became aware that the money in his hands was trust-money, he became a trustee of it: *Sheridan* v. *Joyce* (1). Having, as such trustee, paid over the money without any written request, as to part to Andrews, and as to the rest, to the trustees, for the express object of being misapplied, he must be considered as having concurred in and aided the commission of the breach of trust; he is therefore personally responsible for the consequences. * * *

Mr. Purvis and *Mr. Faber*, for Bousfield. * * *

[516] *Mr. Goldsmid* for Page.

Mr. Southgate for Andrews.

Mr. Kindersley and *Mr. Elderton* for Sims.

Mr. Roupell and *Mr. Beavan* for the representatives of Bullock.

Mr. Turner, in reply. * * *

THE MASTER OF THE ROLLS:

By the terms of the settlement, of which Bousfield had express notice, the money was only to be called in on the wife's request in writing. Bousfield was induced to pay over the money voluntarily, without any request of the wife in writing, and not for the purpose of the performance of the trusts, but, as he believed and the fact was, for the express purpose of committing a breach of trust. On that ground, I think Bousfield is liable.

(1) 68 R. R. 276 (1 Jo. & Lat. 401)

CHRISTOPHERS *v.* WHITE (1).

1847.
July 27.

(10 Beav. 523—525.)

Rolls Court.
Lord LANGDALE, M.R.

Trustees can only be allowed costs out of pocket, for professional business transacted by a firm, one of whom is a trustee, though the business be done by one of the partners who is not a trustee.

[523]

THE testatrix devised real estates to Clement and White, upon trust, after the death of a tenant for life, to sell and pay one-third of the produce unto the plaintiff's wife.

Clement was a solicitor carrying on business in partnership with Newman, and the firm of Clement and Newman, or, as it was said, Newman, on behalf of the firm, managed the affairs of the trust, and after the death of the tenant for life sold the estates. Clement died in 1844, and this bill was filed against White for payment of the one-third share. The accounts, as rendered, were admitted, except as to the professional charges of Messrs. Clement and Newman; and these were now made the subject of discussion.

Mr. Tinney and *Mr. Bates* for the plaintiff: [524]

It is clearly settled, that a trustee cannot make any charge for his professional exertions in the matter of the trust. The same rule applies where trust business is conducted by two solicitors, one of whom happens to be a trustee: *Collins* v. *Carey* (2). The trustee is only entitled to costs out of pocket.

Mr. Kindersley and *Mr. Bagshawe* for White:

The rule ought not to be extended to this case. On the death of the tenant for life, it became necessary to sell the property. Clement, by the state of his health, was incapable of transacting the business, which was done by Newman alone, whom it would be unjust to deprive of all remuneration. At all events the Court ought to grant a reference to the Master, to enquire under what circumstances the expenses were incurred.

Mr. Mitchell for another defendant.

THE MASTER OF THE ROLLS:

I do not think that the circumstances of this case are such as to warrant the Court in making it an exception to the admitted rule.

(1) See *In re Doody* [1893] 1 Ch. 129, 62 L. J. Ch. 14, 67 L. T. 650, where reference will be found to a great number of intermediate decisions upon this rule and upon subsequent qualifications of the rule.—O. A. S.

(2) 50 R. R. 124 (2 Beav. 128).

CHRISTOPHERS v. WHITE.

A trustee is not allowed to act as his own solicitor and then charge his cestui que trust with the amount of his professional fees. The rule admits of exception, when the testator or creator of the trust expressly authorizes the trustee to retain his professional costs, showing thereby, that he would rather run the risk of abuse, by uniting the two characters, and pay the solicitor his costs, than lose his services as trustee.

[525] The principal fact here stated is, that the business was not done by the trustee, he being incapable from ill heath, but that the whole was done by his partner. It was done, however, for his profit as partner, and is the same as if two partners divide their business, one attending to the law department, and the other to the equity, in which case each acts for the profit of the other. Would this Court allow a trustee to say to his partner, "You shall act as solicitor, and earn all the profit you can for the concern." I think that could not be maintained.

For the business done during the life of Mr. Clements, only costs out of pocket can be allowed.

1847.
July 29, 30.

Rolls Court.
Lord LANGDALE, M.R.

On Appeal.
Aug. 5.

Lord COTTENHAM, L.C.

NEWTON *v.* RICKETTS.

(10 Beav. 525—531; S. C. 16 L. J. Ch. 372, *n.*; 11 Jur. 662.)

The existence of a suit to recall probate, in which the probate has been ordered into Court, is not, of itself, a sufficient ground for appointing a receiver.

[525] In August, 1842, Sir Robert Ricketts died, having, by his will, executed shortly before, given his property to his widow and children, but excluding the plaintiff his daughter, Mrs. Newton. He appointed Lady Ricketts, Joseph Cooper Straford, and Thomas Askew, executors, and Straford and Askew, trustees of his will.

In September, 1842, Lady Ricketts and Straford proved the will in the common form, and, as was stated by the plaintiffs, they paid the debts &c., and ascertained the residue. Mr. and Mrs. Newton disputed the validity of the will; they commenced proceedings in the Ecclesiastical Court in 1843, which they had discontinued, as they alleged, from poverty.

[526] In March, 1847, they recommenced proceedings in the Ecclesiastical Court to revoke the probate. Lady Ricketts and Straford were ordered to appear, and to bring into and leave in Court the probate, and to prove the will in solemn form, otherwise to

show cause why the probate and will should not be declared null and invalid.

They accordingly, in April, 1847, brought in the probate, and propounded the will, which was opposed by the plaintiffs, who insisted on its invalidity; and the will had not yet been proved in the solemn form in the Ecclesiastical Court.

The plaintiffs filed this bill on the 17th of July, 1847, against Lady Ricketts, Mr. Straford, Mr. Askew, and the other children of the testator; alleging, that pending the aforesaid litigation in the said Prerogative Court touching the validity of the said pretended will and the said probate thereof, and by the force and operation of the said decree of that Court, and of the said bringing in and leaving the said probate in the registry of the said Court, the said probate was recalled, suspended, and inoperative; and that, pending such litigation, there was no person legally entitled to receive, transfer, or dispose of any part of the personal estate or effects of the said Sir R. Ricketts deceased.

The bill simply prayed a receiver pending the litigation in the Ecclesiastical Court, and an injunction to restrain the transfer of the sum of 33,140*l.*, the residuary assets standing in the name of Mr. Straford, the trustee, and of Charnock, a new trustee, who had been appointed after the testator's death, but had died in 1846.

It appeared that the plaintiffs, before filing their bill, had put a *distringas* on the stock and dividends; and Lady Ricketts having applied to the Bank to allow a transfer, in order, as was alleged, to complete the appointment of a new trustee under the will, in the room of Charnock, this bill was filed. [527]

The plaintiffs now moved for an injunction and receiver.

Mr. Kindersley and *Mr. Chapman Barber*, in support of the motion:

* * Probate was obtained without notice to the plaintiffs, the validity of the will is in contest, and the probate has been recalled; so that there is no person armed with the authority of the Ecclesiastical Court to get in the assets.

(THE MASTER OF THE ROLLS: Notwithstanding the probate has been brought into Court, there is an existing legal personal representative. This Court merely acts for the purpose of protecting *the property. Do you allege any case of insolvency or danger?) [*528]

NEWTON v. RICKETTS.

We do not allege such a case, but the defendant has applied to the Bank to permit a transfer, notwithstanding the *distringas*, and the plaintiffs receive notice that this would be done, unless a bill were filed. This shows, that it is intended to deal improperly with the fund before the right to it had been determined.

Mr. Robson, in the absence of *Mr. Turner*, for Lady Ricketts [cited *Watkins* v. *Brent* (1) and *Rendall* v. *Rendall* (2), where Vice-Chancellor WIGRAM] observed, "Two rules may, I believe, be stated with perfect safety: first, where probate or administration has been granted, a receiver will not be appointed pending litigation in the Ecclesiastical Courts to recall probate, unless a special case be made for doing so." * * *

[529] There are no outstanding assets to get in, and even if the will were set aside, the widow would become entitled to one-third of the fund, and the plaintiffs to a portion only of the remainder. It would be extremely unjust to deprive the parties of their income until the litigation is ended.

The plaintiffs have also disentitled themselves, by their *laches*, to the interference of the Court. It is admitted that they had notice in 1843, and that they took some proceedings which they abandoned.

The fund also is standing in the name of the trustee and not of the executors.

Mr. Roupell and *Mr. T. H. Hall* for Straford, also resisted the motion, and in addition relied on a case of *Connor* v. *Connor* (3), in which Lord COTTENHAM held, that the fact that the Ecclesiastical Court had issued a citation for recalling letters of administration, was not sufficient to induce the Court to interfere against the legal right of the existing administrator.

[530] *Mr. Kindersley*, in reply, said, that in *Connor* v. *Connor*, the LORD CHANCELLOR had discharged the order of the VICE-CHANCELLOR, merely because the parties had offered to bring the money into Court. That the object of the intended transfer in this case was to take the fund, admitted to be part of the assets, out of the hands of the executors, and put it under the control of a stranger.

Mr. Roupell observed that *Connor* v. *Connor* was a suit for the administration of the estate.

(1) 43 R. R. 149 (1 My. & Cr. 97).
(2) 1 Hare, p. 154.
(3) 74 R. R. 157 (15 Sim. 598)

THE MASTER OF THE ROLLS: NEWTO v. RICKETTS.

I will not decide this case before I know what passed in *Connor* v. *Connor*. It may make a difference, that that suit was for the administration of the estate, and that this is merely for a receiver and injunction. Unless something passed in *Connor* v. *Connor* material to the case now under discussion, I hardly think I ought to interfere, and appoint a receiver. What are the facts? Probate of the will has been granted, and for anything yet appearing to the contrary, duly granted, on proof in common form. The plaintiffs desire to have it proved in solemn form, and can require it by a very easy proceeding in the Ecclesiastical Court. An opportunity is given to one side to prove the will *per testes*, and to the other to impeach it, if he can; but what ground is there for equitable relief under these circumstances?

It is satisfactory to find, that the authorities show, that such a state of things alone, affords no right to relief, though it may, if connected with other circumstances; and I can conceive many cases, in which this, coupled with other circumstances, would induce the Court to interfere and protect the property. But is any other ground here alleged? Is it pretended that if the fund be left in the *power of those now having the legal right, it will be exposed to the least danger? That is not even alleged. [*531]

What, then, are the other circumstances? There had been a full administration of the estate, so far as to clear the residue; the executors desire to declare that they hold it in trust for the persons entitled under the will, and wish to apply it for the benefit of such persons. One view to be taken of this case is, that the plaintiffs may, by possibility, establish their right, and it may possibly happen, that by leaving the fund in the hands of the trustees, it may be more difficult to follow it. In the absence of any proof or allegation that the defendants are not perfectly able to answer when required, I am at a loss to know why this Court should interfere at all.

If, notwithstanding the cases cited, I should find that the Lord Chancellor would have granted the injunction in *Connor* v. *Connor*, if the party had not consented to bring the fund into Court, I shall not be at all disposed to act contrary to his decision. It is my duty to follow his example.

I will ascertain what passed in that case; but if I find that it does not govern the present, I shall refuse the motion with costs.

NEWTON v. RICKETTS. *July* 30.

The MASTER OF THE ROLLS said, he found that nothing occurred in *Connor* v. *Connor* which affected this case; and he must therefore refuse the motion with costs.

1847. *Aug.* 5.

[11 Jur. 662]

The MASTER OF THE ROLLS having refused the application, as above stated, it was now renewed before the Lord Chancellor.

Newton, for the plaintiffs, stated the facts of the case, and, in support of the application, cited and commented upon the following cases, viz. *Andrews* v. *Powys* (1), *Watkins* v. *Brent* (2), *Allen* v. *M'Pherson* (3), *Connor* v. *Connor* (4). He cited also *Rex* v. *Buttery* (5), to show that, in an indictment for forging a will, production of the probate is not conclusive evidence of the validity of the will.

Roupell, *Rolt*, and *Robson*, for the defendants, were not called on by the LORD CHANCELLOR.

THE LORD CHANCELLOR:

In this case no improper conduct or want of responsibility is alleged against the party to whom probate has been granted. The case rests only on the proceedings in the Ecclesiastical Court; and the question is, whether, after probate has been granted, and there is an application made to rescind it, the pendency of that proceeding *simpliciter* is a ground for this Court, as of course, to interfere to prevent the parties to whom probate has been granted from using those powers which it confers upon them. In *Watkins* v. *Brent* (2), which I did not recollect until it was mentioned to me, I stated my view of this question; and in the recent case of *Connor* v. *Connor*, I expressed a similar opinion, though, as the parties were willing to bring the fund into Court, it did not become necessary for me to decide the point. I gave, however, an opinion, that where administration is properly granted, and no case made of an intention to misapply the fund, this Court does not interfere. The MASTER OF THE ROLLS has acted upon a similar principle in the present case. Now, all this may be wrong, and it is quite proper that the case should be sifted. I have, therefore, listened attentively to the cases which have been cited, and they all appear to me rather to go against the view sought to be maintained than to support it.

(1) 2 Br. P. C. 504.
(2) 43 R. R. 149 (1 My. & Cr. 97).
(3) 73 R. R. 30 (1 H. L. C. 191).
(4) 74 R. R. 157 (15 Sim. 598).
(5) Russ. & Ry. C. C. 342.

One thing seems to have been lost sight of in dealing with this case. If there be danger of mal-administration of the estate, then this Court will interfere by injunction, and, if necessary, appoint a receiver to act in the place of those appointed. *It does not interfere in reference to the authority which they derive from the Ecclesiastical Court, but only from an apprehension that the property will not be safe in their hands; and thus, therefore, we find the Court granting an injunction or a receiver in cases where the conduct of the parties administering is impeached. In the present case, however, the only fact is, that a suit has been instituted to recall the probate, and, therefore, the other class of cases can form no authority for this simple point. Nothing is here involved but this one point. The case of *Andrews* v. *Powys* (1) arose on demurrer; and as every fact stated was, for that purpose, to be taken as true, whatever was stated on the bill as against the defendant would, consequently, be so treated. In the case of *King* v. *King* (2), no probate had been granted; and the Court acted on that circumstance, because there was no one to protect the estate. The Court in such cases steps in and protects the property until it is known who is to be intrusted with the administration. When, however, probate has been granted, but some other party comes to ask to have it recalled, this does not come under the same rule. In the case of *Atkinson* v. *Henshaw* (3), there was also no probate. In *Rutherford* v. *Douglas* (4), (I take this case as stated to me by the learned counsel), there was an imputation of fraud. In *Ball* v. *Oliver* (5), although a suit had been instituted in the Ecclesiastical Court for the purpose of getting the letters of administration recalled, yet this was not the ground relied on: the case raised was one of insolvency; and though denied by the answer, this was the case upon which this Court had to go; it had to proceed on this allegation of insolvency, and the case was not one *simpliciter* of probate granted, and subsequently disputed. In the case of *Watkins* v. *Brent* (6), the executor had died, and there was no person in possession of probate; and so far from there deciding that the interference of this Court was a matter of course, I carefully guarded myself upon the point. I have now gone through the cases. The assistance of this Court may, in some instances, be necessary to protect the property; but this is a

[*663]

(1) 2 Br. P. C. 504.
(2) 6 Ves. 172.
(3) 2 V. & B. 85.
(4) 1 Sim. & St. 111, *n.*
(5) 2 V. & B. 96.
(6) 43 R. R. 149 (1 My. & Cr. 97).

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different case from that made here. The order to bring in the probate is a matter of course; it is no adjudication on the matter of right; the probate abides the event of the litigation. The question here is, whether this is sufficient to justify this Court in interfering with those against whom no imputation is made, so as to prevent their dealing with property coming to them under the authority of the Ecclesiastical Court. No authority for this has been produced; and I must, therefore, dismiss the motion, with costs.

1847.
June 3.

Rolls Court.
Lord LANGDALE, M.R.
[10 Beav. 532]

BAGSHAW *v.* PARKER (1).

(10 Beav. 532—536.)

By articles of partnership, it was stipulated that, in the event of such severe illness as should oblige the defendant to quit India for more than one year, the books should be made up to the end of the partnership year, and a valuation should be made of the stock. The defendant became an incurable lunatic on his way to India. He arrived there in 1841, and was sent back: Held, that this article contemplated a dissolution; that, according to the fair meaning of the article, the event had happened, and that his partners were entitled to a dissolution as from the end of the partnership year 1842, and not, as contended by the defendants, from the decree.

IN 1840, the plaintiffs, Bagshaw & Co., agreed to form a partnership with the defendant Parker, for the purpose of establishing a sugar and rum manufactory in India. Parker was to go to Bengal, and personally superintend and manage the factory.

Articles of partnership were accordingly executed, dated in July, 1840, whereby they agreed to become partners for five years; and it was agreed, that the plaintiff should purchase the machinery, &c. The thirteenth article was as follows: "In the event of death or such severe illness as shall oblige Mr. Parker to quit India for more than one year, the books to be made up to the end of the partnership year, provided the period gives (in case of death) one year's profit, and a valuation made by persons chosen, one by Mr. Parker or his executors, as the case may be, the other by Bagshaw & Co., or by a third person, in the event of such not agreeing, who shall value the stock, fixed and moveable, the liabilities, &c. &c., which shall be taken at such valuation by the remaining partners."

In October, 1840, the defendant left England for India, but on his passage he became a lunatic. He arrived at Calcutta in

(1) See now the Partnership Act, 1890, s. 35 (a), and the Lunacy Act, 1890, s. 119.—O. A. S.

February, 1841, where he remained some months; but being found incurable, he was sent back, and arrived in England in October, 1841.

The plaintiffs, however, at their own expense proceeded in the undertaking, and they brought the works into active operation in November, 1842. [533]

In consequence of the continuance of the defendant's malady, the plaintiffs, in January, 1843, filed this bill, praying that the partnership might be dissolved, and that it might be declared from what date it was to be dissolved, and that the accounts might be taken.

The cause now came on for hearing, and the only question discussed was, from what day the partnership was to be considered dissolved.

Mr. R. Palmer (in the absence of *Mr. Turner*), for the plaintiffs, asked for a declaration, that the partnership was dissolved from the end of the year 1841, and that the accounts might be taken on that principle. He argued, that although in the case of *Besch* v. *Frolich* (1), the partnership was declared dissolved from the date of the decree; still that case was no authority for the present, for there, the articles of partnership contained no proviso for a dissolution, but here, there was an express stipulation on that head, by the terms of which the rights of the parties ought to be regulated.

That, by the thirteenth article, it was stipulated, that in the event of such severe illness as should oblige the defendant to quit India for more than one year, the trade was to be wound up, and the partnership dissolved; and that it clearly appeared, that the defendant had been disabled by mental illness from continuing in India, and from performing the duties he had undertaken. *That the plaintiffs had done all they could, and had filed this bill without delay. [*534]

That in *Besch* v. *Frolich* Lord LYNDHURST relied on the fact of the lunatic's capital being continued in the business, and considered it would not be equitable that his capital should be subjected to the perils of trade, without allowing him to participate in the profits; but here the whole capital had been advanced by the plaintiffs; that, therefore, in all events, the dissolution ought not, under such circumstances, to be later than the filing of the bill, as in the case of *Kirby* v. *Carr* (2), where there was no capital.

(1) 65 R. R. 363 (1 Ph. 172).

(2) 51 R. R. 356 (3 Y. & C. (Ex. Eq.) 184).

BAGSHAW v. PARKER.

Mr. Amphlett, for Mr. Parker and his committee, did not dispute that the plaintiffs were entitled to a dissolution of the partnership; but contended that it ought to take place from the date of the decree, as in *Besch* v. *Frolich*; that the case did not fall within the thirteenth clause, for the event there contemplated was that of the defendant voluntarily retiring from India for a year by reason of ill health; that a lunatic was incapable of exercising any discretion on the matter, and that his removal could not be considered as an act of his own, or one for which he was responsible.

That if he had remained a lunatic in India, still, though incapable of performing his duties, the dissolution would be from the date of the decree: *Besch* v. *Frolich*. That the plaintiffs ought to have taken some step to determine the partnership, such as giving notice, which notice would have been valid notwithstanding the lunacy, *Robertson* v. *Lockie* (1), and ought to have had the partnership property valued.

[535] *Mr. R. Palmer*, in reply.

THE MASTER OF THE ROLLS:

Though the word "dissolution" is not used, yet I think that the thirteenth clause contemplates a dissolution. I cannot conceive what else can be the meaning of the provision, that the books are to be made up, and the stock to be valued and taken by the remaining partners.

In what event then is a dissolution to take place? "In the event of death, or such severe illness as should oblige Mr. Parker to quit India for more than one year." What happened? Mr. Parker arrived in India, in a state of insanity, in February, 1841. It is true that he was not at that time a voluntary agent, competent to determine whether he would quit India or not. He was left entirely to the care and humanity of persons there. They sent him back to England, which was the best and most proper thing to do. This having been advisedly and prudently done for his benefit, the question is, whether, according to the fair interpretation of this clause, the Court must not hold that he was obliged by severe illness to quit India.

I cannot help thinking that this is the rational and fair meaning to be given to these words. He was obliged to go back to England;

(1) 74 R. R. 80 (15 Sim. 285).

this visitation, this mental affliction rendered it impossible for him to remain there.

It is argued that to bring the case within the clause, it is necessary that there should be an intention on his part; but if he had been of sound mind, his mere intention would not have determined whether he was obliged to quit India or not.

Next, it was necessary that he should be obliged to quit India for more than one year, and in the result I think it appears that he was obliged to quit for more than that time. That year expired some time in 1842; but it is not material to consider on what particular day in the year, because the books were to be made up to the end of the partnership year, that will be up to December, 1842. [536]

Under these circumstances I think that the partnership must be considered dissolved on the last day of the year 1842.

RYALL *v.* HANNAM.

1847. *July* 6, 26.

(10 Beav. 536—541; S. C. 16 L. J. Ch. 491; 11 Jur. 761.)

Rolls Court. Lord LANGDALE, M.R. [536]

A testator devised an estate to "Elizabeth Abbott (a natural daughter of Elizabeth Abbott, of G., single woman, and who formerly lived in his service") for life, with remainder to her children. At the date of the will, there was no person answering this description; for though Elizabeth Abbott, who had formerly lived in his service, had a natural child, yet it was a son and not a daughter, and was named John and not Elizabeth; besides this, Elizabeth herself was not then a single woman, but had married one Caddy, and had a legitimate daughter Margaret. John Abbott being dead, the property was claimed, first, by the plaintiff, on the ground that the gift was void for uncertainty; secondly, by the children of John Abbott; and, thirdly, by Margaret; but the COURT held, under the circumstances, that the children of John Abbott were entitled.

THIS case was argued by

Mr. Purvis and *Mr. Bird*, for the plaintiff, cited [*Miller* v. *Travers* (1), *Selwood* v. *Mildmay* (2), *Denne* v. *Page* (3), *Hay* v. *The Earl of Coventry* (4), *Doe* d. *Hiscocks* v. *Hiscocks* (5)].

Mr. Kindersley and *Mr. Crawford*, for the children of John Abbott. * * * [537]

Mr. Roupell and *Mr. James Campbell*, for Margaret Austin, cited [*Doe* d. *Le Chevalier* v. *Huthwaite* (6)].

(1) 34 R. R. 703 (8 Bing. 244).
(2) 4 R. R. 1 (3 Ves. 306).
(3) 1 R. R. 655, *n.* (11 East, 603, *n.*).
(4) 1 R. R. 652 (3 T. R. 83).
(5) 52 R. R. 748 (5 M. & W. 363).
(6) 22 R. R. 508 (3 B. & Ald. 632).

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Mr. Lovat, for the trustee.

Mr. Purvis, in reply.

[Other cases were cited which have no apparent bearing upon the point here reported.]

The MASTER OF THE ROLLS reserved his judgment.

July 26.

THE MASTER OF THE ROLLS:

[538] William Reed, by his will, dated the 9th day of March, 1798, having devised certain estates to trustees, subject as therein mentioned for the benefit of the children of his nephew William Bell lawfully begotten, gave and devised a certain copyhold estate of inheritance, lately purchased by him of his said nephew William Bell, and which he had surrendered to the use of his will, to his said nephew William Bell, for life, and after his death to trustees to support contingent remainders, and then in trust for "Elizabeth Abbott, a natural daughter of Elizabeth Abbott, of the parish of Gillingham, single woman, and who formerly lived in his service," for her life, and after her decease, then in trust for all and every the child and children of the body of the said Elizabeth Abbott the daughter, lawfully to be begotten, equally between and amongst them, share and share alike, as tenants in common, with a devise over in default of any such issue.

After the testator's death, William Bell, the devisee for life, took possession of the estate. He continued in possession till his death, which happened in October, 1839. The surviving trustee then entered into possession of the estate, and the question is to whom it belongs.

There was no person answering the description of the first devisee in remainder mentioned in the will,—no "Elizabeth Abbott, a natural daughter of Elizabeth Abbott, of the parish of Gillingham, single woman, who had been in the testator's service;" the description being erroneous, and literally applicable to no one.

[539] I. It is alleged by the plaintiff, that it cannot be discovered who was meant, and therefore that the devise is void for uncertainty.

II. It is alleged by the defendants of the name of Abbott, that the testator meant John Abbott, who was a natural son of Elizabeth Abbott, a single woman, who had been in the testator's service, and

who afterwards, and before the date of the will, became Elizabeth, the wife of John Caddy.

III. And it is alleged by the defendant Margaret Austin, that the testator meant herself, *i.e.* Margaret, the legitimate daughter of John Caddy and Elizabeth his wife, who was formerly Elizabeth Abbott, and had been in the testator's service.

The facts are, that in the year 1791 Elizabeth Abbott, a single woman, in the service of the testator, became pregnant: that William Bell, the testator's nephew, and the devisee for life of the estate in question, was the putative father of the child: that the testator desired his nephew to marry this Elizabeth Abbott, but the nephew refused; and the woman having left the testator's house soon afterwards, gave birth to a male child, which was christened John: that the testator took some interest in Elizabeth Abbott, and showed her some kindness after the birth of her son. He knew well that there was a natural child of Elizabeth Abbott of the parish of Gillingham, single woman, who had lived in his service. He may or may not have known that the child was a son; but, except the son John, Elizabeth Abbott never had any illegitimate child.

In the beginning of the year 1795 she married John Caddy, and [540] in November, 1795, the defendant Margaret was born, a legitimate child of that marriage.

There seems reason to believe, and for the purpose of this suit I assume, that the testator continued to notice and to show some kindness to Mrs. Caddy, after her marriage and the birth of her daughter Margaret, who was the only child of the marriage born before the date of the will.

It was under these circumstances,—Elizabeth Caddy having (when Elizabeth Abbott, single woman) had one natural child and no more, viz. a son, of whom William Bell was the putative father, and having had a legitimate daughter born to her husband John Caddy,—that the testator made his will, and thereby, after making a provision for the children, namely, legitimate children of William Bell, gave this estate to him for his life only, with remainder, as it is expressed, to "Elizabeth, a natural daughter of Elizabeth Abbott, a single woman."

After great doubt, and with much difficulty, I have at length come to the conclusion, that the testator should be deemed to have meant to give the estate in remainder to the person who was the only natural child of Elizabeth Abbott single woman, the only person to

RYALL v. HANNAM.

whom he can be supposed to have had some relation through his nephew William Bell, to whom the life interest in the estate was given. The words, as they stand in the will, have no application to any person; but a valid devise in favour of some one must have been meant, and I cannot conclude that the testator did not mean to make a provision for the natural child of Elizabeth Abbott; and if it be, as I think it ought to be, concluded, that he did mean to [*541] provide for her natural child, then as she had *only one, I think that the mistake of the name and sex ought not to defeat the devise; and on the whole I am of opinion, that the children of John Abbott became entitled to the benefit of the devise.

1847.
June 7.

Rolls Court.
Lord LANGDALE, M.R.
[547]

HUDLESTON *v.* GOULDSBURY.

(10 Beav. 547—551; S. C. 11 Jur. 464.)

Canal shares will not pass under a bequest of property vested in "bonds or securities" (1).

A testator willed that certain property should be vested in a manner most secure, and least liable to fluctuation or risk, and that 3,000*l.* should be at the will of his wife at her death; but the residue he willed his wife should distribute to his relations. He made his wife residuary legatee: Held, that the distribution to the relations was not to take place until the wife's death, and the Court inclined to the opinion that the wife took a life estate by implication; but held that, at all events, she was entitled for life under the residuary gift to her.

THE testator, General Marshall, by his will dated in 1845, after giving "to his affectionate, dutiful and dearly beloved wife," all his plate, furniture, books, wine, carriages and horses, and all his goods and chattels of every description, with the exception of such articles as might be particularly devised in any following part of his will, and after giving his wife his arrears of pay, and the balance at his banker's, proceeded as follows:

"And as for and concerning my property, that is or may be vested in the British or foreign funds, or in bonds or securities of any description, I will that the property may be vested in such manner as she, with the advice of my executors, may consider most secure, and least liable to fluctuation or risk. And further, that the principal sum of 3,000*l.* shall be at the will and disposal of my said wife at the time of her death, to whomsoever she will, but the residue of

(1) The term "securities" may by modern usage be readily extended by context so as to denote the same meaning as "investments:" see *In re Rayner* [1904] 1 Ch. 176, 177, 73 L. J. Ch. 111, 89 L. T. 681, C. A.; *In re Gent and Eason's Contract* [1905] 1 Ch. 386, 74 L. J. Ch. 383.—O. A. S.

the property, over and above the said 3,000*l.*, I will that my wife shall distribute to my relations, whose relative claims she is fully acquainted with." He appointed his wife executrix, "and likewise to be residuary legatee of his estate; and he accordingly gave and bequeathed to her, for her sole use and benefit and disposal thereof, all his worldly property and estates whatever, with the exception of the legacies and bequests thereinbefore mentioned." And he appointed three gentlemen to be joint executors.

The testator died possessed (amongst other things) of money [548] in the funds, East India stock, Russian and other bonds, and eight Shropshire canal shares.

This bill for administration now came on for hearing upon the Master's report.

Mr. Lloyd, for the plaintiff, and

Mr. Roupell and *Mr. Bennet*, for the next of kin, contended, that the canal shares passed by the bequest of property vested in securities, and that the testator intended to include all property invested by him, whether in the funds, bonds, or in public Companies, and yielding interest or profits, and that this was the usual and popular meaning of the expression used by the testator.

Secondly. That after setting apart the 3,000*l.* sterling, the remainder of the residuary estate was immediately distributable amongst the next of kin of the testator; for the residue of the property (without any reservation of a life interest to the widow), over and above the 3,000*l.*, was to be distributed by her amongst the testator's relations, "whose relative claims," added the testator, "she is fully acquainted with;" and that these words showed, that the distribution was to be among a class existing at the death of the testator, with whose claims she was then fully acquainted, and not amongst a class living at her death whom she might know nothing of.

Mr. Kindersley and *Mr. Steuart Macnaghten*, for the widow:

A canal share cannot be considered an investment in a security. It consists not of any capital sum, but is a mere share in the property of a trading concern: *Sparling* *v. *Parker* (1). They [*549] therefore belong to the widow as residuary legatee.

Secondly. The widow takes a life interest in this property by implication: *Blackwell* v. *Bull* (2). * * *

(1) 73 R. R. 403 (9 Beav. 450). (2) 44 R. R. 52 (1 Keen, 176).

HUDLESTON v. GOULDSBURY.

Thirdly. At all events, the fund is not distributable amongst the relations until her death, and the intermediate income belongs to the widow as residuary legatee. * * *

Mr. Lloyd, in reply.

June 7. THE MASTER OF THE ROLLS:

I am of opinion that a share in a Canal Company cannot be
[*550] deemed property invested on security. A *share in a Canal Company is property, which may be bought and sold without reference to any sum given for or secured by it. It is not a security for money, but the property itself that is bought or sold.

The principal question is, whether the widow is entitled to a life interest in this particular property. The testator directs it to be vested in such manner as she, with the advice of his executors, might consider most secure, and least liable to fluctuation or risk. That was to be done, no doubt, at his death, when his wife had acquired a right to deal with the property, and his executors were in a condition to assist her with their advice; or as soon after as might be convenient. It has been contended that this direction to invest in a non-fluctuating or permanent fund is quite inconsistent with the notion of making an immediate distribution, and therefore that unless the Court finds subsequent words, which make it imperative to have an immediate distribution, that is, unless you find words so strong as to overrule the effect of the previous direction to invest in a permanent and non-fluctuating investment, it must hold that the distribution was not to take place at the testator's death.

Again: the testator directs the sum of 3,000*l.* sterling to be at the will and disposal of his wife at the time of her death; that is, 3,000*l.*, part of the very property which he directs shall be invested. "The residue of the property" is to be distributed by his wife amongst his relations. The residue of what property? Why, the residue of the property which he had previously directed to be invested in securities least liable to fluctuation, after taking away the 3,000*l.*

[551] I am of opinion that this will ought to be read thus: The whole shall be invested on a permanent security, and at her death the 3,000*l.* shall be given to whomsoever she wills, and the residue shall be then distributed amongst my relations.

This is the effect of the sentence: he meant the whole to be kept together till her death, and then 3,000*l.* was to be given to any person she might think proper, and the remainder was to be distributed by her amongst his relations, whose relative claims she was fully acquainted with.

It is very true that he has not said a word about a life interest to his widow. It is, however, unnecessary to say whether a life interest is or is not given to her by implication. I am very much inclined to think there is; but suppose it otherwise, still if the distribution is not to take place until her death, then she becomes entitled to the intermediate income under the residuary clause or gift to her of everything not thereinbefore given by the will.

It is true, that it was intended that she should exercise a judgment and discretion with respect to the claims of his relations; and it was argued, that the time when such judgment could be most fairly and advantageously exercised would be immediately upon the testator's death. I do not know what claims may hereafter arise amongst the relatives in respect of that residue; but I do not think this is a sufficient ground for saying, that the distribution is to take place at the time of the testator's death.

COLES *v.* FORREST.

(10 Beav. 552—558.)

1847.
April 24.
July 10.
Aug. 3.

Rolls Court.
Lord LANGDALE, M.R.
[552]

A. mortgaged to B., who filed a bill of foreclosure, and B., pending the suit, assigned to C., who mortgaged to D., and became insolvent. D. filed a supplemental bill to have the benefit of the suit for foreclosure: Held, that he was entitled to such relief.

A mortgagee filed a bill of foreclosure, and pending the suit, transferred the mortgage to A. B., who transferred it to C. D. Held, that the extra costs thus occasioned were not to be charged against the mortgagor.

Pending a suit, by a first mortgagee to foreclose, the plaintiff obtained a transfer from the second mortgagee: Held, that the costs occasioned were chargeable against the estate.

A. B. mortgaged a leasehold property, and afterwards specifically bequeathed it to A. and B., on certain trusts for C., D. and E.: Held, that C., D. and E. were proper parties to a bill to foreclose.

A mortgagee had been in possession. She transferred the whole of her interest, and afterwards became insolvent. Her assignees were made defendants to a bill of foreclosure: Held, that their costs ought not to be charged on the mortgaged estate, but on the plaintiff.

TANNER, being entitled to a leasehold property at Oxford, mortgaged it first to Coles, and afterwards to Redhead.

COLES v. FORREST.

In 1831, Caroline Coles filed a bill of foreclosure against the representatives of Tanner and against Redhead.

In 1835, Caroline Coles assigned the premises to William Coles, who, in the same year, mortgaged them to Ward. The mortgage of Redhead was also, in the same year, transferred by Redhead to Caroline Coles, and by her to William Coles.

In December, 1836, William Coles and Ward filed the second bill, which was one of revivor and supplement. Afterwards, both Caroline and William Coles became insolvent, and, in 1845, Ward, as sole plaintiff, filed the third bill, which was a supplemental bill, bringing the assignees of both before the Court.

[553] The three suits now came on for hearing.

Mr. Kindersley and *Mr. Chapman Barber*, for the plaintiff Ward, asked for the common decree for foreclosure.

Mr. Turner and *Mr. Chandless* for the defendants:

First. Ward is entitled to no relief in this suit; he is a mere sub-mortgagee from an assignee *pendente lite*, *Booth* v. *Creswicke* (1), where "after decree in a suit by a second mortgagee, to redeem the first and foreclose the subsequent mortgagees, one of the subsequent mortgagees assigned his interest in the premises to A. A. then filed a bill against all the parties to the former suit, praying to be entitled to the benefit of that suit, and to redeem the mortgagees who were prior to himself, and to foreclose the others. The bill was dismissed as against all the defendants except the assignor: and A. was declared to be entitled to stand in his place, and to use his name in the further prosecution of the first suit."

Secondly. The costs occasioned by the assignment of Caroline Coles pending the suit and of the assignment by Redhead, and also the costs of making the assignees parties, ought to be borne by the mortgagees, and not thrown on the mortgaged estate.

On this point the following cases were cited—*Wetherell* v. *Collins* (2), *Bartle* v. *Wilkin* (3).

[554] *Mr. Kent*, for the insolvents' assignees, asked for their costs as against the plaintiff.

Mr. Kindersley, in reply:

The plaintiff Ward, having a charge on the estate, has a right to

(1) 42 R. R. 201 (8 Sim. 352).
(2) 18 R. R. 229 (3 Madd. 255).
(3) 42 R R. 166 (8 Sim. 238).

make it effective. *Booth* v. *Creswicke* differs from the present, for there the rights of the parties had been settled by decree, previous to the assignment.

I admit, that where a mortgagee comes for a foreclosure, although he is entitled to be paid his principal, interest, and costs, still, he is not entitled to costs occasioned by his miscarriage. Here the whole costs have been occasioned by the default of the mortgagor in not paying his debt, according to his contract. If he had redeemed, the mortgagees would not have been reduced to the necessity of assigning their interest, or of entering into litigation, and both the suit and assignment would have been prevented. The general rule is to allow a mortgagee all such costs.

THE MASTER OF THE ROLLS:

I doubt whether, in regard to the costs, there is any thing requiring the special direction of the Court.

The taxing Masters, to a considerable extent, take these matters into their consideration.

If, in the usual course of proceeding, they would take into their consideration the question of costs unnecessarily or improperly incurred pending the suit, I should not think it right to interfere at all, or give any specific directions; but if they would not, then, as *Mr. Turner* observed, the costs might be allowed as of course, unless some notice of them were taken in the decree.

With respect to the other objection, that the plaintiff Ward is entitled to no decree whatever in this suit, I do not see that the circumstances of this case are at all like that decided by his Honour, the VICE-CHANCELLOR OF ENGLAND. As Mr. Ward has an assignment of the mortgaged estate, surely he has a right, in the absence of any decree or determination to the contrary, to have this matter investigated. I do not think you can make any reasonable objection to that. [555]

I will communicate with the taxing Masters to see whether, without specific directions, they would take this matter into their consideration. They sometimes do so to a considerable extent. The Vice-Chancellor KNIGHT BRUCE the other day referred to them to ascertain whether in taxation they would allow the costs of an assignment, and they answered in the negative.

The case was re-argued, when *July* 10.

The MASTER OF THE ROLLS said, he would consider the question.

COLES v. FORREST. *Aug.* 3.

THE MASTER OF THE ROLLS:

This case stood over with respect to the costs. I have since consulted one of the taxing Masters on the question, whether the costs incurred after the institution of the suit by certain assignments of a mortgage ought to be charged against the mortgaged estate.

[556] A bill to foreclose leaseholds was filed by Caroline Coles, the executrix of Thomas Coles, the first mortgagee against the representatives of the mortgagor and Redhead a second mortgagee. It seems that some years after the institution of the suit, Caroline Coles the plaintiff assigned her mortgage interest to William Coles, and William Coles assigned it to Henry Ward. These assignments were made by the plaintiff after the institution of the suit, and were of such a nature as to make the suit wholly inefficient, and it could not have gone on. I am of opinion the costs specially occasioned by them ought not to be charged against the mortgaged estate. Therefore, in the taxation, the Master is not to allow, as against the estate, any increase of costs occasioned by Caroline Coles having assigned her securities.

Redhead, the second mortgagee, assigned his second mortgage to Caroline Coles, who assigned it to William Coles. I am of opinion, on the authorities upon the subject, that the costs occasioned by those assignments may be charged against the mortgaged estate.

There is another point which I have had some difficulty about. The assignees of Caroline Coles are made defendants to the third bill. Caroline Coles, the first mortgagee, assigned the whole of her interest to William Coles. She afterwards became the assignee of Redhead's second mortgage, which she assigned over to William Coles. Having assigned the whole of her interest, she became insolvent; and one does not see why her assignees were made parties at all. I conjecture that something was due from her in her character of first mortgagee.

Mr. Kindersley:

Yes. She had been in possession and in receipt of the rents.

[557] THE MASTER OF THE ROLLS:

That is what I conjectured. However, in either point of view, my opinion is that the costs which have been occasioned in that way ought to be paid by the plaintiff, and ought not to be charged against the estate.

Another point arose in this case as to parties. Tanner, the

mortgagor, by his will, bequeathed the mortgaged property to the defendants Forrest and Haynes, upon trust to pay his widow 18*s.* a week, and subject to the mortgages, in trust for his sons John and William.

In the bill for foreclosure the plaintiff had made defendants, not only Forrest and Haynes, but also the widow, and the representatives of John and William. It was objected by the defendants, that the widow and the representatives of John and William were unnecessary parties. On the other hand, it was said, that this being a specific bequest, every person, having an interest in the equity of redemption, was a necessary party, in order that he might be foreclosed, and that a perfect decree might be made and sure title acquired under the foreclosure.

THE MASTER OF THE ROLLS:

The mortgagor himself was the first person to destroy the simplicity of the original transaction. He, by his will, bequeathed the property to two trustees in trust, for three other persons, thus giving the beneficial interest to those three persons in that specific property. I certainly think that this bill was properly constituted, *so far as it made parties, the trustees of and the parties beneficially interested, in this specific bequest. [*558]

ROUTH *v.* WEBSTER (1).

1847. *Jan.* 28.

(10 Beav. 561—563.)

Rolls Court. Lord LANGDALE, M.R.

The provisional directors of a joint-stock Company, having, without the authority of the plaintiff, published a prospectus, stating him to be a trustee of the Company, were restrained by injunction.

[561]

In 1846 a joint-stock Company, called "The Economic Conveyance Company," was established, having for its object the carrying passengers by steamboat and omnibus at the average rate of 1*d.* a mile. The defendants, the provisional directors, had published prospectuses, in which the name of the plaintiff was used, without his authority, as a trustee of the Company. They also paid monies into the bankers of the Company to the plaintiff's account as trustee.

The plaintiff, conceiving that he might be subjected to responsibility by the unauthorised use of his name, filed his bill against

(1) Foll. in *Walter* v. *Ashton* [1902] 2 Ch. 282, 71 L. J. Ch. 839, 87 L. T. 196, and see *Hodges* v. *The London Trams Co.* (1883) 12 Q. B. D. 105, 50 L. T. 262.

ROUTH v. WEBSTER.

the directors, and now moved for an injunction to restrain them from using his name in connection with the Company.

Mr. Turner and *Mr. Edward M. Harrison*, in support of the motion, argued, that the defendants ought to be prevented using the plaintiff's name in this unauthorised way, as it might subject him to liabilities and litigation from the shareholders and others; and that this application was necessary, for otherwise the plaintiff might be held liable on the ground of his acquiescing in this use of his name.

[562]

Mr. Tinney and *Mr. Waley, contrà*, resisted the injunction:

They stated that the plaintiff's name had been used under a notion that he had concurred in it; that the defendants had no intention to use it for the future, and were willing to give the plaintiff an indemnity, that they had always been desirous of doing so, and of avoiding unnecessary litigation.

THE MASTER OF THE ROLLS:

The sort of opposition made to the application to prevent the unauthorised use of the plaintiff's name furnishes a specimen of the anxiety of the defendants to avoid unnecessary litigation.

I think that the plaintiff is entitled to the injunction. I have no doubt that the plaintiff never did consent to be a trustee. The defendant Webster might have thought he did: if he did, his belief rested upon a very slight foundation. However, the name of Mr. Routh, who desired to have nothing to do with this concern, has been published to the world as a trustee: his name was also used at the bankers; and though he may not be subjected to the duties of trustee, yet it is plain that he is exposed to some risk by the unauthorised act of the defendants in using his name. Money was placed in his name at the bankers, and he is left to get rid of his responsibility as he can.

The defendants having published his name as a trustee, some negotiation took place for giving the plaintiff an indemnity, and which he was willing to accept as a condition for his not applying for an injunction. This was not given, and then the matter remained as it was before. He now moves for an injunction to

[*563]

prevent the defendants proceeding in the *same course for the future, and the defendants, not pretending that they have a right to continue the use of his name, and disavowing any intention of doing so, nevertheless file affidavits in opposition to the application.

ROUTH v. WEBSTER.

I am of opinion that the plaintiff is entitled to the injunction; and, if it subjects the defendants to expense, let it be a warning to them as well as to others not to use the names of other persons without their authority. What! Are they to be allowed to use the name of any person they please, representing him as responsible in their speculations, and to involve him in all sorts of liabilities, and are they then to be allowed to escape the consequences by saying they have done it by inadvertence? Certainly not.

Is not the plaintiff entitled to be protected against a repetition of those misrepresentations which have already been made? I am willing to believe the statement made on behalf of the defendants, that they do not intend to repeat their misrepresentations; but I think the plaintiff is not bound to rely on their assurance, and that he is entitled to be protected by the order and injunction of this Court.

ABSTRACT OF ORDER.—Restrain the defendants "from printing, publishing, or circulating any prospectus or other document of or relating to a certain Company called the Economic Conveyance Company, mentioned and referred to in the plaintiff's bill in this cause, with the plaintiff's name thereto, and from, in any manner, using the name of the plaintiff, so as to identify him as a party interested or associated with the said Company."—Reg. Lib. 1846, B. fol. 338.

EARDLEY *v.* OWEN.

(10 Beav. 572—581; S. C. 17 L. J. Ch. 67; 11 Jur. 1047.)

1847. *Dec.* 20, 22.

Rolls Court. Lord LANGDALE, M.R. [572]

A father, on the marriage of his daughter A., gave her husband 1,500*l.* for her present portion or fortune, and he covenanted, that, in case he should give his other daughter B., on her marriage or otherwise, a greater portion or fortune than 1,500*l.* in money or value, his executors would, within a year after the death of himself and wife, pay or deliver to the husband of A., such further or other sum or property, as would be equal with the portion or fortune given to B. The father, on the marriage of B., gave her a portion of 1,500*l.*, and by his will, after charging his real estate with the payment of his debts, gave B. his furniture and a life interest for her separate use in some freehold and leasehold property: Held, that the life interest was within the covenant, but the furniture not; and, secondly, that a debt of this nature was charged on the real estate.

THE testator, Owen Bennion, had two daughters, Elizabeth and Sarah.

In 1800, Elizabeth married Latham, and on that occasion a deed of settlement was executed. It recited *an agreement, on the part [*573]

HARDLEY v. OWEN.

of her father, to give Elizabeth the sum of 1,500*l.*, and pay the same to Latham; and also that his executors or administrators should, after the decease of himself and wife, "in case of his giving to his other daughter, Sarah Bennion, more than the sum or value of 1,500*l.* for her portion, pay or deliver unto Latham, such further or other sums or property, as should make the portion or fortune of Elizabeth equal to that of Sarah;" and Owen Bennion covenanted with Latham, in case the marriage should be solemnized, to pay him 1,500*l.* as the present portion or fortune of Elizabeth (which he afterwards did); and further that, "in case he, Owen Bennion, should give to his other daughter Sarah, on her marriage or otherwise, a greater portion or fortune than 1,500*l.*, in money or value, the executors or administrators of him, Owen Bennion, would, within the space of twelve calendar months next after the decease of the survivor of him and Mary his wife, pay or deliver over to Latham, his executors or administrators, in money or value, such further or other sum or property as would be equal with the portion or fortune given to or intended for Sarah."

In 1809 Sarah married Owen, and her father gave her a portion of 1,500*l.*

The testator, Owen Bennion, survived his wife, and died in July, 1829. By his will, he directed all his just debts, funeral and testamentary expenses to be paid and discharged, as soon after his decease as conveniently could be; and he charged all his real and personal estate and effects with the payment thereof. He devised some real and leasehold estates to trustees for Sarah for life, for her separate use, with remainder to her son in fee. He also bequeathed to Sarah certain household goods and furniture.

[574] This bill, filed by the representatives of Latham, sought an account of the property which Sarah became entitled to under the will, and that the value of the portion or fortune of Sarah above 1,500*l.* might be ascertained, and an equal sum paid out of the testator's real and personal estate as a specialty debt.

The testator, it was stated, had no personal estate beyond the furniture, valued at 30*l.*, which was insufficient to pay the testamentary expenses, and having died in 1829, the 1 Will. IV. c. 47, was inapplicable to this case.

Mr. Turner and *Mr. Haldane* for the plaintiffs, and

Mr. Teed and *Mr. Speed* for defendants in the same interest:

The intention of the parties, and the agreement between them, as

stated in the recital, was to give to Latham such further sum "as should make the portion of Elizabeth equal to that of Sarah," and, accordingly, the testator covenanted, that, if he gave Sarah a greater portion or fortune than 1,500*l.*, he would pay Latham such other sum as would be equal to the portion or fortune given to Sarah. Having contracted the obligation, he "could not defeat the effect of it by any testamentary act:" *Fortescue* v. *Hennah* (1); and under the charge of debts contained in his will, his real estate, though devised, became liable to satisfy the obligation created by the covenant, and to pay to the representatives of Latham the value of the property given to Sarah by the testator's will. * * *

Mr. Kindersley and *Mr. C. Hall* for Owen and wife, and *Mr. Anderdon* and *Mr. F. J. Hall*, and *Mr. Roupell* and *Mr. Goodeve* for parties in the same interest: [575]

Upon the construction of the settlement, the devise of the real estate in trust for the separate use of his *daughter for life, is not [*576] within the covenant. First, because the parties contemplated a "portion or fortune" given on the marriage of Sarah, and not at his death; and the covenant was satisfied on the marriage of Sarah, in 1809, when he gave her no greater "portion or fortune" than he had already given to her sister. Secondly, because the parties had within their contemplation a gift of personalty only, and therefore a devise of realty did not come within it. The portion of 1,500*l.* then given to Elizabeth was personalty, and the expressions "give" "pay or deliver over" are applicable to personalty only, and not to real estate; and further, the words "in money and value" are like the expression "money or valuable effects" used in *Logan* v. *Wienholt* (2), which were considered by the House of Lords to be applicable to personalty only. Thirdly, the covenant applies to gifts *inter vivos*, and not to devises or bequests by will. Fourthly, neither a life interest nor a gift independent of the husband is within the meaning of the words "portion or fortune," used in the covenant. * * *

Mr. Turner, in reply. * * * [577]

THE MASTER OF THE ROLLS: *Dec.* 22.

The first question arising in this cause depends upon the construction and effect which ought to be given to *a settlement made [*578]

(1) 12 R. R. 137 (19 Ves. p. 70).

(2) 36 R. R. 215 (7 Bligh, pp. 44, 50, 52, 77; 1 Cl. & Fin. 611).

EARDLEY v. OWEN.

on the marriage of John Latham and Elizabeth Bennion, and to the will afterwards made by Owen Bennion, the father of Mrs. Latham.

The question is, whether the provision made by the will for the testator's daughter, Elizabeth, is to be considered as an additional "portion or fortune" within the meaning of those words as used in the settlement.

On the marriage of his daughter Elizabeth, the testator agreed to pay to her husband 1,500*l.*, and that his executors should, within twelve months after the death of the testator and his wife, in case he gave to his other daughter Sarah more than 1,500*l.* for her portion or fortune, pay or deliver to Latham, the husband of Elizabeth, such further sum or property, as should make the portion or fortune of Elizabeth equal to that of Sarah. The settlement was made in consideration of the marriage, of the 1,500*l.* then agreed to be paid, and of such further sum or property as aforesaid; and Owen Bennion, for himself, his executors, and administrators covenanted to pay as therein mentioned the sum of 1,500*l.* as and for the present portion or fortune of Elizabeth, and further, in case he should give to Sarah on her marriage or otherwise a greater portion or fortune than 1,500*l.* in money or value, his executors or administrators should, in twelve months after the decease of himself and his wife, pay or deliver to Latham, the husband of Elizabeth, in money or value, such further or other sum or property, as would be equal with the portion or fortune given to or intended for Sarah.

The marriage took effect, and the sum of 1,500*l.* was paid to the husband of Elizabeth, according to the covenant for that purpose.

[579] Sarah afterwards married John Owen; and on that occasion the testator advanced the sum of 1,500*l.* as her portion, and thereby the portions or fortunes of Sarah and Elizabeth were made equal. If things had remained in that state, the question now made would not have arisen.

But subsequently, Owen Bennion, by his will, gave a freehold estate, and, by a separate gift, a leasehold estate, subject as in his will mentioned, to trustees on trust for his daughter Sarah, for her separate use during her life: and he also gave to her certain furniture.

By these gifts, Sarah received from her father more than Elizabeth; and the question is, whether that more or any part of it ought to be treated as a portion or fortune so given, as to entitle

Latham, under the covenant, to have from the testator's estate such further sum, property or value, as would make the portion or fortune of Elizabeth equal to that of Sarah. It is a provision made by the father out of his estate for his child, in addition to the portion given on her marriage, and constituting, together with the portion then given, the portion or fortune, which, on the whole, he provided her. I think that such a gift as this, of a life interest in freehold or leasehold estates cannot be considered as other than part of her fortune given her by her father.

By the gift, he did, in fact, provide for Sarah more than he had given with Elizabeth; and I think that, by his agreement and covenant, he was under an obligation to make the portion or fortune of Elizabeth equal to that of Sarah. It therefore appears to me, that the gift to Sarah, by the will, of a life interest in freehold and leasehold estate, is to be considered as an additional portion or fortune within the meaning of the covenant *in the settlement. [*580] The furniture does not appear to me to fall within the same principle.

The testator, by his will, directed that all his just debts, funeral expenses, and the expenses attending his will should be paid, as soon as conveniently might be, and he charged all his real and personal estate with the payment thereof; and the second question in this cause is, whether the obligation arising from the covenant or agreement to make the portion or fortune of Elizabeth equal to that of Sarah, is to be considered a debt charged on the real estate by the will. That such an obligation is a debt payable out of the personal estate, and that it is not a debt which could be recovered against a devisee under the Statute of Fraudulent Devises, is not disputed; but the charge being made by the same will which gives the additional fortune to Sarah, it is argued that the testator could not have contemplated or could not have intended to provide for Elizabeth a fortune of which he made no mention.

I think, that the testator must be deemed to have intended that all his just debts and all his obligations should be charged on his real estate, and, supposing him to have had that intention, he must have meant to charge this particular obligation. It cannot be deemed necessary to the validity and effect of such a charge as this, that the testator should have actually contemplated and had in his mind every particular debt or obligation to which he was liable, or to have intended not to include a particular debt, because it could not have been recovered from the devisee by action of covenant; and,

EARDLEY v. OWEN.

upon the authorities which were cited in the argument, I think, that the claim of the plaintiffs under the covenant is a debt within the meaning of the charge in the will.

[581] I have assumed, as was stated on all sides, that the personal estate was deficient, but that must be regularly ascertained. If it should turn out to be so, there may be some, but no insuperable, difficulty in ascertaining the exact value of the beneficial interest given to Sarah, and consequently, the exact value of that which is due to the plaintiffs; but I must declare them to be entitled, under the settlement and the will, to receive out of the assets of the testator a sum or value equal to the value of the beneficial interest given to Sarah by the will. Order the usual accounts to be taken, and direct the Master, having regard to the charge of debts, including that due to the plaintiffs (taking that to be equal to the beneficial interest given to Sarah), to ascertain the value of the beneficial interest given to Elizabeth.

IN THE QUEEN'S BENCH.

REG. *v.* THE INHABITANTS OF HARROW ON THE HILL.

1848. *June* 19.

[103]

(12 Q. B. 103—106; S. C. 17 L. J. M. C. 148; 12 Jur. 518.)

Under the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1 (1), a pauper cannot be removed under an order of justices, if he has resided in the parish five years next before the application for a warrant of removal, whether such residence or any part of it was after or before the passing of the Act.

Assuming the first proviso in sect. 1, (which excludes from the computation of the five years any time during which the party shall have been in prison or receiving parochial relief, &c.) to be retrospective, a residence down to the time of the application makes the party irremoveable, though he may have received parochial relief within five years of the application, provided the residence amounted in the whole to five years exclusive of the period of such relief.

ON appeal against an order of justices for removing Henry Pritchard and his wife and children from the parish of Harrow on the Hill in Middlesex to the parish of Ruislip in the same county, the Sessions (May, 1847) quashed the order, subject to the opinion of this Court on the following case.

The pauper, Henry Pritchard, resided in Harrow for ten years next before 26th August, 1846, and continued so to reside in Harrow on that day and from that day until 9th December, 1846, when the warrant now appealed against was applied for and made. During the greater part of the year 1844, while so *residing in Harrow, the [*104] said pauper H. P. was in the receipt of relief from Ruislip, which was and still is his place of settlement. It was admitted that the pauper H. P. and his family had become chargeable to and had received relief from Harrow, and that the order or warrant appealed against was in all other respects regular and valid, except that, as the appellants contended, it ought to be quashed inasmuch as the paupers were, under the provisions of stat. 9 & 10 Vict. c. 66, s. 1, irremoveable. The respondents submitted that, the pauper H. P. having been in receipt of relief during a part of the five years next before the application for the order or warrant, and before 26th August, 1846, the statute did not apply, and the paupers were removeable. The Quarter Sessions held that the paupers were not removeable, and quashed the order or warrant of removal, subject to the opinion of the Court of Queen's Bench. If this Court should be of opinion that the paupers were removeable from Harrow for

(1) See 11 & 12 Vict. c. 111, s. 1, 24 & 25 Vict. c. 55, s. 1, 27 & 28 Vict. c. 105, s. 1, 28 & 29 Vict. c. 79, s. 8, 31 & 32 Vict. c. 122, s. 34.—A. C.

REG. v. THE INHABITANTS OF HARROW ON THE HILL.

the reasons contended for by the respondents, the order of Sessions was to be quashed: if this Court should be of the contrary opinion, the order of Sessions was to be confirmed and the order of removal quashed.

Pashley, in support of the order of Sessions:

Stat. 9 & 10 Vict. c. 66, s. 1 (1), enacts: "That from and after the passing of this Act no person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five (2) years next before [*105] the application *for the warrant." That clearly applies to residence before the Act passed, unless the clause be so construed that a man who has always lived in a parish shall not be irremoveable by reason of five years' residence until 1851. The same section goes on: "Provided always, that the time during which such person shall be a prisoner in a prison," "or during which any such person shall receive relief from any parish," "shall for all purposes be excluded in the computation of time hereinbefore mentioned." If that proviso is prospective only, no question arises here: if it be retrospective, the year 1844 may be excluded from the computation, and the pauper will have resided nine years.

Creasy, contrà:

The proviso is retrospective; and there must have been an unbroken residence of five years next before the application for a warrant: in that case an order obtained before the Act could not be executed; nor could an order be obtained subsequently. But, if the last five years' residence has been interrupted as the proviso specifies, it is no bar to a removal or to an application for an order: and this is the meaning of the words "shall for all purposes be excluded." The five years are not to be patched up from scattered periods during which a vagrant may have been unrelieved or not in prison. A continued industrial residence was contemplated: if that ceases, and the man becomes chargeable to a parish, the design of the Act is that he shall no longer be irremoveable. Bodily absence is not necessarily an absence, if there be *animus revertendi*: a like reasonable view ought to be taken of bodily residence.

[*106] (PATTESON, J.: Your argument is that, *if a person has resided

(1) Royal assent, 26th August, 1846.
(2) Altered to three years by 24 & 25 Vict. c. 55, s. 1, and to one year by 28 & 29 Vict. c. 79, s. 8.—A. C.

ten years before application for an order of removal, but, at the end of eight, has received relief, his exemption is destroyed.

LORD DENMAN, Ch. J.: The one act of relief puts an end to all his chances; indeed his certainties. It is wonderful you can come to such a conclusion.)

Per CURIAM (1):

Order of Sessions confirmed.

REG. *v.* THE INHABITANTS OF HALIFAX.

1848.
June 24.
July 12.

(12 Q. B. 111—117; S. C. 17 L. J. M. C. 158; 12 Jur. 789.)

[111]

If an order of removal states that it was made by justices "in and for" the proper district, it need not also state the particular place where it was made within that district.

It is not necessary that an order of removal, since the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), should negative that a pauper has become chargeable in consequence of sickness or accident.

A pauper is not irremoveable from a parish on the ground of residence, under 9 & 10 Vict. c. 66, s. 1 (2), if, at any time during the five (3) years next before application for an order to remove him, he has been removed from the parish under a prior order; for such removal is a break in the residence.

And it makes no difference that the pauper so removed leaves behind furniture in a house rented and occupied by him at the time of his removal and retains the key of the house, and that he has always the *animus revertendi*, and actually returns and resumes occupation of his house after an absence of a few days.

ON appeal against an order of justices for the removal of Hannah Hume, widow, and her children, from the township of Halifax in the West Riding of Yorkshire to the township of Alnwick in Northumberland, the Sessions quashed the order, subject to a case, which was stated, in substance, as follows.

The order of removal was made on 12th December, 1846. The pauper was married, about twelve years before the present order of removal, to her late husband John Hume, who died in Halifax, the 13th January, 1845, leaving the pauper his widow, and the said children. Since her marriage, the pauper had always resided with her husband up to the time of his death in Halifax, and continued to reside there till 25th January, 1845, when, having become with her family chargeable to Halifax, she was removed, by an order of justices of that date, to the said parish of Alnwick, and delivered

(1) Lord DENMAN, Ch. J., PATTESON, COLERIDGE and ERLE, JJ.

(2) See p. 219, *ante*, note (1).

(3) See p. 220, *ante*, note (2).

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under it, on 1st March, 1845, to one of the overseers of Alnwick. The said order of 25th January, 1845, had the marginal venue "West Riding of Yorkshire," and purported to have been made by two justices "in and for the said Riding," but did not specify any particular place in the Riding as the place where it was made. This [*112] order formed the ground of the removal by the present *order. The parish of Alnwick is in a union called the Alnwick Union. The pauper remained at Alnwick from 1st March, 1845, to 19th March, 1845, and during all that time was chargeable to the said parish of Alnwick, and received relief out of the workhouse from the guardians of the Union. While the pauper was at Alnwick, the guardians of the Union offered her seven shillings and sixpence a week, if she would return to Halifax, and an additional sum of three pounds for her expenses in returning there. The pauper had always been desirous of returning to Halifax, where her friends lived, and agreed to take the money, without which she could not have gone back to the respondent township. She accordingly received the three pounds, and seven shillings and sixpence besides for one week's allowance in advance, returned to Halifax, and continued, after her return, until 4th November, 1846, to receive the weekly allowance from the said guardians. Upon her husband's death, she paid the rent for a house in which she lived at Halifax; and, on her removal to Alnwick under the order of 25th January, 1845, she left the furniture in the said house, and kept the key of it while she remained at Alnwick, and took possession of it again on her return to Halifax. When the said guardians of Alnwick, on 4th November, 1846, discontinued their weekly allowance to the pauper, she became with her family chargeable to the respondent township, and received relief accordingly.

The appellants, under their grounds of appeal, objected at the trial: First, that the former order of removal of January, 1845, did not appear to have been made within the jurisdiction of the justices [*113] who made *it. The Sessions overruled the objection, subject to the opinion of this Court.

Secondly, that the examinations failed to show that the pauper and her family had not become chargeable to the respondent township in respect of relief made necessary by sickness or accident to the said pauper, or to any one of her said children, and that the order of 12th December, 1846, did not state that the justices were satisfied that any such sickness or accident would produce permanent disability. The Sessions overruled the objection, subject to the opinion of this Court.

Thirdly, that the said pauper and her family were irremoveable from the respondent township, in consequence of having resided therein for five years next before the application for the order of removal of 12th December, 1846, after excluding, in the computation of such time, the time during which the said paupers had been receiving relief from any parish: and the Sessions allowed this objection, subject to the opinion of this Court.

If this Court should be of opinion that any of the above objections was valid, then the order of Sessions was to be confirmed: but, if this Court should be of a contrary opinion, the order of Sessions was to be quashed, and the order of removal confirmed.

The case was argued on a former day in this vacation (1).

Pashley and *Hamerton*, in support of the order of Sessions:

The order should have alleged that the pauper had not become chargeable in respect of relief made *necessary by sickness, or that [*114] such sickness would produce permanent disability, so as to show the legality of the removal with reference to stat. 9 & 10 Vict. c. 66, s. 4. But the important question is as to the five years' residence under the first section of the statute. If the first proviso of that section be retrospective, then the residence was complete, because the period during which the pauper was in the receipt of parochial relief, whether at Alnwick or Halifax, is to be excluded in the computation.

(PATTESON, J.: The proviso seems to apply merely to relief given in the same parish in which the five years' residence is to be computed; for residence elsewhere would not be included in the computation.)

The proviso is quite general; and the pauper's constructive residence was at Halifax even during her absence at Alnwick. Her home was continuously at Halifax; and "residence" means "home;" per ERLE, J. in *Whithorn* v. *Thomas* (2). * * *

R. Hall and *Pickering*, *contrà*: [115]

First, it was not necessary that the order should negative that the chargeability was occasioned by sickness; for that is matter of objection only. Secondly, the proviso is not retrospective; and, if

(1) June 24th. Before Lord Denman, Ch. J., Patteson and Coleridge, JJ.

(2) 66 R. R. 633 (7 Man. & G. 1, 10).

REG. v. THE INHABITANTS OF HALIFAX.

it be, it does not apply to a residence not in the same parish in which the residence for five years is alleged.

(COLERIDGE, J.: I have a difficulty in construing the proviso. It may be supposed that all the cases in it are within some common principle. The time excluded by the proviso appears to be time that would, if there were no proviso, be reckoned under the enacting clause; and yet I do not understand how time of service as a sailor would be reckoned in any parish, or time of residence as an in-pensioner at Greenwich could be reckoned at Halifax, even if there had been no special exclusion.)

The object may have been twofold; first, to protect the particular parishes in which prisons and hospitals are situate, and, secondly, to obviate the consequences of constructive residence by persons of a particular class. *Rex* v. *Mitchell* (1) may exemplify the latter view; there it was held that freemen of Norwich, substitutes in the militia, quartered at Colchester, but having dwelling-houses at Norwich, in which their families resided, were constructively inhabitants of Norwich. In the present case, however, there was no constructive residence at Halifax during the pauper's absence at Alnwick; for, although she had the will, she had not the power to return, the law having placed her under the control of others; and she could not return without subjecting herself to punishment as "an idle and disorderly person," under stat. 5 Geo. IV. c. 83, s. 3.

Cur. adv. vult.

[116] LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

In this case the order of removal was made on the ground that a former order had been unappealed from. The objection to the form of that order was, we think, properly overruled by the Sessions.

The objection that there was no negative of the chargeability being occasioned by sickness or accident was also, we think, properly overruled.

It further appeared, in respect of the residence for five years, that the pauper had in March, 1845, been removed, under an order of removal, from Halifax to the appellant parish, and had remained in that parish nineteen days, and had then returned to Halifax. She had been renting a cottage before the removal, the key of which she had kept; and she left the furniture therein when she

(1) 10 East, 511.

was removed from Halifax, and had always the desire of returning thereto. She had also resided in Halifax more than nineteen days immediately before the beginning of the five years in question. The Sessions decided that she had become irremoveable, and discharged the order: but we are of opinion that the Sessions came to a wrong conclusion.

We take it to be clear, as a general proposition, that removal puts an end to residence. A review of the statutes under which the power of removal has been exercised, from stat. 13 & 14 Car. II. c. 12, downwards, shows that the pauper was considered originally as an intruder upon the inhabitants, and the power of removing was given to prevent his becoming an inhabitant. A removal, therefore, is in its nature a disruption of residence and inhabitancy. That being the general principle, do the facts here stated in respect of the cottage, and the desire of return, constitute an exception? *We think not: the right to return was taken away while the state of chargeability continued; the desire to return without the right is very different from the *animus revertendi* which in some cases of absence keeps up the continuity of residence. The facts relating to the cottage are not stated with precision; the possession of property does not consist with chargeability; and an exception to a general principle, unless the ground of the exception could be stated with precision, is to be avoided in law.

[*117]

The order of Sessions, therefore, is quashed, and the original order confirmed.

Order of Sessions quashed.

REG. *v.* THE INHABITANTS OF GLOSSOP (1).

1848. *June* 19. *July* 12.

(12 Q. B. 117—119; S. C. 17 L. J. M. C. 171; 12 Jur. 1071.)

[117]

Where a pauper has resided five years continuously in a parish first as wife and afterwards as widow, the two periods of residence coalesce, so as to render her irremoveable under the Poor Removal Act, 1846 (9 & 10 Vict. c. 66).

Where an order of removal has been made before 9 & 10 Vict. c. 66, and the pauper has not been removed, it is no ground of appeal that the pauper has become irremoveable by virtue of the statute since the order was made.

ON appeal against an order of justices, made on 20th July, 1846, for the removal of Margaret James, widow, and her children,

(1) Foll. *Reg.* v. *St. George in the East* (1870) L. R. 5 Q. B. 364, 369, 39 L. J. M. C. 90; *Medway Guardians* v. *Bedminster Guardians* (1888) 21 Q. B. D. 278, 281, 57 L. J. M. C. 129 (affd. in H. L. 14 App. Cas. 465, 59 L. J. M. C. 29).—A. C.

REG. v. THE INHABITANTS OF GLOSSOP.

from the township of Mottram in Longdendale, in the county of Chester, to the parish, township or place of Glossop, in the county of Derby, the Sessions (October, 1846) confirmed the order subject to a case.

It appeared from the case that the paupers were settled in the
[*118] appellant parish in right of the deceased *husband of the pauper Margaret; that he died in 1844; that the paupers had resided in the respondent parish for more than five years continuously next before the making of the order of removal; and also that the paupers had not been actually removed under the said order.

The questions for the opinion of the Court were: First, whether the paupers were irremoveable by virtue of stat. 9 & 10 Vict. c. 66; secondly, whether, the order having been made before the passing of the said statute, there was any right of appeal before actual removal.

The case was argued, on a former day in this vacation (1), by

Pickering, in support of the order of Sessions, and *Egerton*, *contrà*.

The argument is sufficiently noticed in the judgment of the COURT.

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered judgment:

In this case the question was raised, whether residence as widow would coalesce with residence as wife, to complete the five years' residence required for irremoveability; and we are of opinion that it would. Such residence is within the terms of the statute (2); it is residence; and we see no reason why full effect should not be given to the meaning of that word.

[119] The question, also, was raised, whether the statute created a ground of appeal against an order of removal made before the statute, and valid at the time it was made, by reason that the pauper had become irremoveable before the time the appeal was heard: and we think this question ought to be answered in the negative. The appeal was given by stat. 13 & 14 Car. II. c. 12, s. 2, to any person aggrieved by the judgment of the two justices. Now the order afforded no ground of complaint, having been valid when made, and not having been acted on by removing since the statute

(1) June 19th. Before Lord Denman, Ch. J., Coleridge and Erle, JJ.

(2) Sects. 1, 2.

had taken away the power of removing. As the statute provides both that no person shall be removed, and also that no warrant shall be applied for, it appears to us that effect can only be given to both clauses by deciding that the pauper may become irremoveable although a valid order existed. The Sessions, therefore, did right in confirming the order. But, as the order is not to be acted on, and the only use of the confirmation is as evidence of the settlement in case the question should arise hereafter, and as the circumstances are peculiar, we would suggest that the entry of the judgment by some such expression as "order confirmed, although the pauper has, since it was made, become irremoveable under it," would explain the matter in case it should be necessary hereafter to recur to it.

Order of Sessions confirmed.

REG. *v.* THE INHABITANTS OF SEEND.

1848. *Nov.* 11.

(12 Q. B. 133—137; S. C. 12 Jur. 939.)

[133]

Pauper, having resided twenty years in parish S., went from S. in consequence of an order of removal to parish C., unappealed against. She intended to return to S. if the parish of C. would allow her to do so, and relieve her at S. She lived for a week in C. at her sister's-in-law, and then, by direction of the parish officers of C., returned to S., where she was relieved by C., and continued to reside till the order next mentioned. Within five years of her going to parish C. another order of removal to C. was made.

Held, that stat. 9 & 10 Vict. c. 66, s. 1 (1), did not make her irremoveable from S., the residence having been discontinued by her going to parish C. within the five years (2) preceding the second order.

Though her child and furniture remained throughout at the house in S., and the pauper continued her tenancy there and paid rent for the whole period.

ON appeal against an order of justices, dated 11th February, 1847, removing Mary Janes and her two children from the chapelry of Seend in Wiltshire to *the parish of Camerton in Somersetshire, [*134] the Sessions quashed the order, subject to the opinion of this Court on a case, which was stated substantially as follows.

No question arose upon the order of removal, the examinations, the chargeability of the paupers, the notice of chargeability, or the grounds of appeal. It was proved that the pauper Mary Janes was a widow, and had remained in the chapelry of Seend for upwards of eighteen years, up to 1842; when she, with four children, became chargeable to Seend, and was removed from thence under an order

(1) See p. 219, *ante*, note (1). (2) See p. 220, *ante*, note (2).

REG. v. THE INHABITANTS OF SEEND.

of removal, bearing date 3rd May, 1842, to Camerton. At that time she was tenant from year to year of a cottage in Seend, of which she and her family were the sole occupants. She paid 5*l.* per annum for the cottage; and it contained furniture which belonged to her. She, and her husband in his lifetime, had resided in this cottage under the tenancy aforesaid for upwards of twenty years previous to the removal to Camerton in 1842. When Mary Janes and her four children were removed under the said order to Camerton, she left an unmarried daughter, twenty-two years of age, in charge of the cottage and furniture; and, on her arrival at Camerton, she went to stay with her sister-in-law, who resided there; but the children removed under the order returned to Seend the same day, and went to the cottage, and continued to reside there as before; the pauper, Mary Janes, remaining in Camerton seven days, during the whole of which time she lived at her sister's-in-law: and, after having attended the board of guardians for the district in which Camerton is situate, she returned to Seend, and took up her abode in the aforesaid furnished cottage, and continued
[*135] to reside there under the *aforesaid tenancy, with her children, until the making of the order which is the subject of the present appeal. Mary Janes paid the whole year's rent for the cottage, which accrued due in 1842; and no interruption took place in the yearly tenancy thereof, as between her and her landlord. When taken to Camerton under the aforesaid order, she had the intention to return to Seend if she could, but did not intend to return there unless she could get out door relief from Camerton. When she went before the board of guardians for the union, as before mentioned, on being asked, by the chairman of the board, whether she intended to stay in Camerton, she replied she should like to go back to Seend on account of her children who were left there; and the board told her she should be allowed 4*s.* per week by the parish of Camerton: and that sum was accordingly paid to her at Seend from that time up to 12th November, 1846, when the payment was discontinued.

Upon these facts it was contended by the appellants that the pauper had resided in the chapelry of Seend for five years next before the application for the order of removal, and was consequently irremoveable. On the other side it was contended that the effect of the order of removal of 3rd May, 1842, executed and unappealed from, was to break the continuity of the residence; and that the
[*136] pauper was consequently *removeable under the order now in

dispute. The Sessions decided that the pauper was irremoveable, and quashed the order.

If the Court of Queen's Bench should be of opinion that the judgment of the Sessions was right, the order of Sessions was to be confirmed: if otherwise, the order of Sessions to be quashed, and the order of removal to be confirmed.

Hadow, in support of the order of Sessions:

Reg. v. *Halifax* (1) will be relied upon as against the order of Sessions. The question, however, is whether, under stat. 9 & 10 Vict. c. 66, s. 1, an order of removal, of itself and where the residence is not in fact discontinued, breaks the continuity of the residence. This was not in fact a discontinuance of the residence: a literal and unintermitted abode is not essential, provided there be a residence, in the common sense of the word, and no absence without an *animus revertendi*. Here the pauper goes away only for a few days, intending to return if she can, and keeps her house in Seend, where her children and furniture remain throughout. * * *

Ball, contrà, was stopped by the COURT.

LORD DENMAN, Ch. J.: [137]

This case is not open to doubt. The removal made the residence, for however short a time, discontinuous. There was no *animus revertendi* not subject to the will of the officers of the parish where the pauper was settled.

WIGHTMAN, J. (2) concurred.

ERLE, J.:

The power of removal was given by stat. 13 & 14 Car II. c. 12, with the intention of preventing the removed person from continuing his residence.

Order of Sessions quashed.

(1) *Ante*, p. 221.

(2) Coleridge, J. was absent.

1848.
Nov. 15.

REG. *v.* THE INHABITANTS OF ST. EBBE'S (1).

(12 Q. B. 137—142; S. C. 18 L. J. M. C. 14.)

[137]

The proviso of the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1, that, where a man's wife or children have no other settlement than his own, they shall be removeable when he is removeable, and not removeable when he is not, refers to the case of a man being legally removeable, and not to his being in fact removeable or not by reason of his presence in the parish or absence from it.

ON appeal against an order of justices (29th April, 1847) for removing Mary Elsbury and her children from the parish of St. Andrew the Less in the borough of Cambridge and county of Cambridge to the parish of St. Ebbe in the city of Oxford, the Recorder (June, 1847) confirmed the order, subject to the opinion of this Court on a case, the material parts of which were as follows.

On the trial of the said appeal, it was proved that John Thomas
[*138] Elsbury came to reside in St. Andrew the *Less at Midsummer, 1846, with the said Mary, his wife, and the said &c. their three children. That he and they resided there from Midsummer, 1846, till March, 1847, when he deserted them, as hereinafter stated. That the said Mary and her said three children continued to reside in St. Andrew the Less from the time of such desertion till the making of the said order. That, at the time of making the said order, the said Mary and her said three children were still residing in St. Andrew the Less. That the said J. T. E. had, before the application for the said order, deserted from his said wife and children. That, at the time of the said application for, and of making, the same order, and at the time of hearing the said appeal, the said J. T. E. still continued absent from his said wife and children. That, at the time of applying for and making the said order, and from thence up to and at the time of hearing the said appeal, the said J. T. E. was not residing or inhabiting in St. Andrew the Less. That the residence of the said J. T. E. was unknown. That the said J. T. E. was settled in St. Ebbe's; and that the said Mary and the said children had no other settlement than his, and were removed by the said order to his said settlement. Counsel for the appellants objected that, inasmuch as the said J. T. Elsbury was not, at the time of the applying for and making the said order, inhabiting or residing in St. Andrew the Less, the said J. T. E. was not removable from the same parish, and that,

(1) Cited in *West Ham Union* v. *St. Matthew, Bethnal Green* [1894] A. C. 236, 63 L. J. M. C. 97.—A. C.

therefore, under stat. 9 & 10 Vict. c. 66, his said wife and children were not removeable therefrom.

The Recorder held the wife and children removeable, subject to a case. If this Court should be of opinion that the said Mary E. and the said three children were, *under the above circumstances, removeable from St. Andrew the Less, then the said order was to be confirmed; otherwise to be quashed.

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Worlledge, with whom was *J. H. Mills*, in support of the order of Sessions:

Sect. 1 of stat. 9 & 10 Vict. c. 66, makes persons who shall have resided for five years irremoveable, with a proviso, excluding from the computation of years time passed in imprisonment, service as a soldier, &c. Then follows a second proviso, "that whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removeable whenever he or she is removeable, and shall not be removeable when he or she is not removeable." The argument on the other side is that, inasmuch as the husband here is not removeable, because out of the parish, the wife and children are irremoveable by virtue of the statute. But the proviso must be construed only as a qualification of the enacting clause; and "removeable" and "not removeable" must be read as if accompanied by the words "according to the provisions of this Act." Otherwise the second proviso introduces a substantive general enactment. *Reg.* v. *Salford* (1) shows how the enacting and excepting clauses of sect. 1 are to be construed together. According to the construction now attempted, if a man, not having resided five years, went into another parish, his wife and children could not be sent to him there, though it were his place of settlement. And, if a man were transported for life, his family could never be removed.

(He was then stopped by the COURT.)

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Naylor and *Metcalfe*, *contrà*:

Reg. v. *Salford* (1) was decided on the first proviso, which is connected by reference with the enacting clause. The second proviso, on which this case turns, is independent. The general object of stat. 9 & 10 Vict. c. 66, is to prevent litigations and removals; particular clauses must be considered with reference to

(1) 12 Q. B. 106. [Overruled by *Hartfield* v. *Rotherfield* (1852) 17 Q. B. 746.—A. C.]

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that intention. Before this Act passed, it was not an established principle that a wife could not in any case be separated from her husband on the ground of settlement, though the proceeding had been condemned as against good morals. The point was discussed in *Rex* v. *Eltham* (1) and *Reg.* v. *Stogumber* (2), and was treated in *Reg.* v. *Leeds* (3) as not finally decided. The proviso here, as construed by the appellants, would render that violation of morals no longer necessary. It evidently contemplates the case of a wife and husband who are for the time apart; for it would have been unnecessary to provide that when they were together she should not be removed. The policy of the Legislature probably was that, while a man was serving abroad, or confined in a prison or hospital, his family might not be driven from place to place so that he should be unable to find them on his return or release. The proviso does not refer to the enacting part; for the words are "any person," not "any such" person as in the former proviso: and the protection given by the second proviso is unnecessary to persons coming within the enacting clause of sect. 1, who are irremoveable by having resided five years. In sects. 2 and 3 the
[*141] statute goes on to make enactments *for the protection of married women, and of children under the age of sixteen, likewise independent of the five years' clause.

(COLERIDGE, J. referred to stat. 11 & 12 Vict. c. 111 (4).)

That Act, by sect. 2, is inapplicable to cases in which notice of appeal has been given before September 4th, 1848. And, although it professes to remove doubts for the future, the Legislature cannot demonstrate the intention of a prior Act by indirect expressions in a later. The proviso in question is for a beneficial purpose, and should be equitably expounded.

(1) 5 East, 113.
(2) 48 R. R. 613 (9 Ad. & El. 622).
(3) 5 Q. B. 916.
(4) Stat. 11 & 12 Vict. c. 111, s. 1, after reciting sect. 1 of stat. 9 & 10 Vict. c. 66, continues: "And whereas by reason of the generality of the expressions used in the last proviso doubts are entertained as to the meaning thereof, and it is desirable to remove such doubts: Be it therefore enacted" &c., "That the said last proviso be repealed, and that instead thereof the following be enacted: Provided always, that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removeable from any parish or place from which he or she would be removeable, notwithstanding any provisions of the said recited Act, and should not be removeable from any parish or place from which he or she would not be removeable by reason of any provision in the said recited Act."

LORD DENMAN, Ch. J.:

I am of opinion that the second proviso and the enacting part must be read together, and that the words "when he" "is not removeable" mean when he is irremoveable by law, and not by the accidental circumstance of his having left the parish.

COLERIDGE, J.:

It is the nature of a proviso to limit the generality of a previous enactment. Here the section first enacts that no person shall be removeable from a parish in which he shall have resided for five *years next before application for a warrant. Then a proviso [*142] enacts that the time during which such person shall be a prisoner &c., or serving as a soldier or sailor &c., shall not be computed in the five years. But, as a question would then arise as to the removeability of the wife or children where the man's residence had been so interrupted, the second proviso removes that doubt by saying that where the husband remains irremoveable the wife and children shall be so; but when he becomes removeable the wife and children shall be removeable also.

WIGHTMAN, J.:

I am of the same opinion. I think the word "removeable" in the last proviso relates to a person who would be removeable if he remained in the parish, without reference to the accidental circumstance of his being within it or not at a particular time. And I think the later statute gives the true meaning of the earlier.

ERLE, J.:

The proviso means that the wife shall be removeable if the husband is legally liable to removal: it does not refer to the physical capacity of being removed.

Order of Sessions confirmed.

REG. *v.* THE INHABITANTS OF POTT SHRIGLEY (1).

1848. *Nov.* 25.

(12 Q. B. 143—149; S. C. 18 L. J. M. C. 33; 13 Jur. 60; 3 New Sess. Cas. 317.)

[143]

Pauper resided with her husband in a parish from June, 1841, to April, 1846, when he was committed to a prison out of the parish for felony, of which he was convicted at the next Assizes, and transported. Pauper continued to reside in the parish until September, 1846: Held that, as such

(1) Cited in *West Ham Union* v. *St. Matthew, Bethnal Green* [1894] A. C. 236, 63 L. J. M. C. 97.—A. C.

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imprisonment made a break in the husband's residence, the pauper was removeable within the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1.

The caption of examinations, on which an order of removal was made, stated that they were taken on the complaint of parish officers as to the last place of legal settlement of the pauper: Held that, on grounds of appeal, stating that the order and examinations were bad on the face, and that the order of removal was not made on the complaint of such parish officers, it was not open to the appellants to object that the examinations did not properly state the subject-matter of complaint.

The examination of a relieving officer of a union, before removing justices, stated that the pauper was resident in, and receiving relief from, the respondent parish within the union. On the trial of an appeal against the order of removal, the relieving officer of the union stated that he had relieved the pauper, at the request of an overseer of the respondent parish, in which the pauper was residing; and that he had continued such relief by order of the board of guardians, charging the respondents with the amount; and the order book of the board of guardians was produced, containing a statement of the particulars of such relief, and that it was given by their order: Held, that chargeability to the respondent parish was stated in the examination and proved at the trial.

ON appeal against an order of justices for the removal of Sarah Crompton and her children from the township of Pott Shrigley, in the county of Chester, to the parish or township of Tildesley cum Shackerley, in the county of Lancaster, the Sessions quashed the order, subject to the opinion of this Court upon a case, which was stated, in substance, as follows:

The order of removal was made on 25th August, 1846. The examinations purported to be "taken upon the complaint of the overseers of the poor of Pott Shrigley" "as to the said Sarah Crompton's last place of legal settlement" without further specification of the subject-matter of complaint.

The examination of James Cardwell, relieving officer of the Adlington and Bollington District of the Macclesfield Poor Law Union in the county of Chester, stated, that "the said Sarah Crompton" and her children "are now resident in, and receiving
[*144] relief from, the township of *Pott Shrigley in the said district and union. And the said Sarah Crompton for herself saith" &c.

The grounds of appeal, so far as it is necessary to set them out, were: 1. That the order and examinations were bad upon the face thereof; 3. That the paupers were not legally chargeable to the respondent township; 4. That the order was not made upon the complaint of the overseers of the respondent township; 5. That the removal of the paupers was, at the time of making the order, contrary to the provisions of stat. 9 & 10 Vict. c. 66, s. 1.

On the trial of the appeal, James Cardwell proved that he was the relieving officer of the Adlington and Bollington District of the

Macclesfield Union, in which district the respondent township is situate; that the Macclesfield Union consisted of forty-one townships, of which Pott Shrigley was one; that on 12th August, 1846, the pauper Sarah Crompton, who was living in the respondent township, applied to him for relief for herself and her children; that he then relieved her with 5*s.* in provisions on account of the respondent township; that one of the overseers of the respondent township had applied to him so to relieve the paupers; that witness brought the case before the board of guardians on the 18th of that month, and they ordered the relief to be continued to the paupers for a month at the rate of 5*s.* per week; and that he paid them at that rate for the month, and charged the amount to the respondent township. He also produced the order book of the board of guardians, wherein were set out the names of the pauper and her children, their residence in the respondent township, the amount of relief the witness had given them the week before, and an *order [*145] that the relief at 5*s.* per week should be continued for a month to the paupers, and that an order should be obtained for their removal; and he proved that the entries and order were made in his presence. In cross-examination he proved that he weekly obtained a cheque from the board of guardians upon the treasurer; and that out of the money he thus obtained from the common fund of the union he paid the relief; and that the application for the order of removal was made on 25th August, 1846.

The pauper Sarah Crompton proved that she was the wife of Richard Crompton the younger, and was married to him fifteen years ago; that, in June, 1841, they went to reside in the respondent township, and continued to live there together until April, 1846, when he was apprehended on a charge of felony and committed to Chester Castle, a prison out of the respondent township; that he remained in such prison until the following Assizes, when he was tried and transported; and that she continued to reside with the said children in the respondent township until 26th September, 1846, when she and her children were taken under the order of removal in this case to the appellant township. The appeal was after the removal.

It was objected (*inter alia*) by the appellants:

1. That the examinations were bad, the caption not stating them to be taken on the complaint of the overseers of the respondent township, and because they did not allege that the paupers were come to inhabit in and were actually chargeable to the respondent township.

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2. That there was no sufficient evidence, on the face *of the examinations, of the paupers being chargeable at the time of making the order.

[*146]

3. That the evidence of chargeability given at the Sessions was not sufficient.

4. That, by the provisions of the above Act, the paupers could not be removed under the order of removal, although it was obtained before the passing of the Act, the paupers having resided in the respondent township for five years and upwards before the application for the order.

If the Court should be of opinion that any one of the objections to the examinations was good, or that the evidence of chargeability given at the Sessions was "insufficient," or that the paupers could not be removed in consequence of their having resided for more than five years in the respondent township before the application for the order of removal, the order of Sessions was to be confirmed; otherwise, to be quashed, and the order of removal confirmed.

The case was partly argued in Trinity Term, 1848; and the argument was concluded in the present Term (1).

Pashley and *Pickering*, in support of the order of Sessions:

[*147]

The caption is bad for not stating the subject of complaint: *Reg.* v. *Molesworth* (2), *Reg.* v. **Gomersal* (3). The objection is open to the appellants: *Reg.* v. *Witham* (4), where the ground of appeal was similar to the present. Secondly, the examinations contain no legal evidence of chargeability: *Reg.* v. *Little Marlow* (5), *Reg.* v. *Bradford* (6). Thirdly, the pauper was irremoveable under stat. 9 & 10 Vict. c. 66. The words of the statute conferring irremoveability after five years' residence are general; and general words in a statute should receive a general construction, unless in the statute itself there are some grounds for restraining the meaning: *Beckford* v. *Wade* (7). The statute may reasonably

(1) The argument began on 10th June, before Lord Denman, Ch. J., Patteson, Wightman and Erle, JJ., when a question was raised as to the meaning of the question as to the evidence of chargeability being "insufficient," and the argument was adjourned for the purpose of ascertaining from the Sessions in what sense the word "insufficient" was intended to be used: the chairman reported that by "sufficient" the Sessions meant "legal;" and the argument was resumed, on 8th November, before Lord Denman, Ch. J., Coleridge, Wightman and Erle, JJ.

(2) 9 Q. B. 65.

(3) 12 Q. B. 76.

(4) 12 Q. B. 88.

(5) 10 Q. B. 223.

(6) 8 Q. B. 571; note (*h*) to *Reg.* v. *Hartpury*.

(7) 11 R. R. 20 (17 Ves. 87, 91).

have intended to confer a personal boon so as to prevent personal hardship. The pauper had an inchoate right, when her husband's imprisonment commenced; and the first proviso to the sect. 1 does not prevent her from perfecting her right. The case is the same as if her husband had died instead of going to prison. He is no longer to be considered as the head of her family. If he had deserted her, she might have completed her residence. In *Reg.* v. *Cottingham* (1) it was held that the wife of an Irishman who had no settlement in England might, if deserted by him, be removed to her maiden settlement. Stat. 11 & 12 Vict. c. 111, s. 1 (supposing it otherwise applicable) is not retrospective (s. 2), and therefore does not affect this case.

Townsend, contrà:

First: The point taken as to the caption of the examinations is not raised by the grounds *of appeal. Secondly. The examinations contain legal evidence of chargeability: *Reg.* v. *Crondall* (2). Thirdly. The residence to confer irremoveability must be that of the head of the family. *Reg.* v. *Salford* (3) therefore applies, as the imprisonment was out of the parish. [*148]

Cur. adv. vult.

LORD DENMAN, Ch. J., now delivered the judgment of the COURT:

The first question was, whether the examinations were stated to be taken on the complaint of the churchwardens and overseers; and the ground of appeal was specifically confined to this question. The examinations are stated to be so taken; and we are of opinion that the appellants are not at liberty under this ground of appeal to contend that the matters complained of are not sufficiently specified; and that for this reason *Reg.* v. *Gomersal* (4) does not apply.

The second question was, whether the chargeability was shown on the examinations and proved at the trial. And we think it was shown by the statement of relief being given, and proved by the evidence according to *Reg.* v. *Little Marlow* (5).

The third question was, whether the pauper had become irremoveable, as she had resided in the respondent parish for five years next before the application for the order. She was the wife of a man who, in April, 1846, was committed to a prison out of the

(1) 7 B. & C. 615.
(2) 10 Q. B. 812.
(3) 12 Q. B. 106. [See p. 231, *ante*, note (1).]
(4) 12 Q. B. 76.
(5) 10 Q. B. 223.

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parish upon a charge for which he was at the Summer Assizes
[*149] *sentenced to be transported. She had resided with her husband till his commitment: and at that time the five years' residence was not complete. If the husband be supposed to have returned to his wife, and the order to have been applied for to remove him, he would not have been irremoveable by reason of five years' residence, because an imprisonment in another parish on a criminal charge ending in a conviction and a long imprisonment and transportation is a break in the residence: *Reg.* v. *Salford* (1). The effect of the proviso in stat. 9 & 10 Vict. c 66, s. 1, whether we look to stat. 11 & 12 Vict. c. 111, or not, appears to us to be that the wife is removeable, if, under the circumstances, the husband, having come to her and become chargeable, would have been removeable. Therefore the rule will be absolute for quashing the order of Sessions.

Order of Sessions quashed.

1849. *Jan.* 17.

[157]

REG. *v.* THE INHABITANTS OF TACOLNESTONE.

(12 Q. B. 157—160; 18 L. J. M. C. 44; 13 Jur. 80; 3 New Sess. Cas. 353.)

In 1841, pauper, who had resided five years with his wife and family in parish St. M., in rooms hired by the quarter, went to T., the parish of his settlement, to obtain work or relief, and was there employed and paid by one of the overseers for about six weeks, during which time he lodged in the poor-house. He then returned to his wife and family, who, during his absence, continued to reside in the same rooms, and were maintained by him; and he resided there with them up to December, 1846, when an order for his removal from St. M. to T. was applied for. For the four years next before the passing of the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), he received relief from the parish of his settlement.

Held, that the pauper's absence from St. M. was no break in his residence, as there was clear evidence of his *animus revertendi;* and that he had become irremoveable within 9 & 10 Vict. c. 66, s. 1 (2).

Whether a pauper had the *animus revertendi* is a question of fact; and the Sessions ought to determine it.

ON appeal against an order of justices, made on 2nd December, 1846, for removing John Gell and his wife from the parish of St. Martin at Oak in the city of Norwich, in the county of Norfolk, to the parish of Tacolnestone in the same county, the Recorder confirmed the order, subject to the opinion of this Court upon a case, stated in substance, as follows.

The pauper, John Gell, whose settlement was in the appellant parish, had resided in the respondent parish more than five years

(1) 12 Q. B. 106. See note (1), *ante*, p. 231. (2) See *ante*, p. 219, note (1).

next before a certain day in January, 1841, when he was still residing there with his wife and family in two rooms, hired by the quarter, being part of a dwelling-house in the respondent parish. He was a weaver: and, on the day referred to, being out of work, he went to the appellant parish for the purpose of obtaining work or relief, and was there employed by one of the overseers of that parish, and continued so employed by him, for a period of six or seven weeks, during which time he lodged in the poor-house there, being paid wages by the said overseer. At the end of the six or seven weeks during which he was so *employed by the overseer, he [*158] returned to the respondent parish to his wife and family, who, whilst he was so absent, resided in the same two rooms, and were maintained there by him: and he resided with his family in the respondent parish from the time of such return until and up to the time of application for the warrant of removal. For the four years next before the passing of stat. 9 & 10 Vict. c. 66, the pauper was in receipt of relief from the appellant parish: and on the passing of the said statute such relief was discontinued, and he became chargeable to the respondent parish; to which parish he continued to be, and was, chargeable up to and at the date of the said warrant of removal.

The settlement of the pauper in the appellant parish was not questioned: but it was contended that through his residence in the respondent parish he was irremoveable. If the Court should be of that opinion, the warrant was to be quashed: but, if not, it was to be confirmed.

Pashley and *Bulwer*, in support of the order of Sessions:

The absence of the pauper from the respondent parish was, under the circumstances stated, a break in his five years' residence there, within stat. 9 & 10 Vict. c. 66, s. 1. In *Reg.* v. *Halifax* (1) it was decided that absence for a very short time under the constraint of an order of removal was a break in the residence, although the pauper always had the *animus revertendi* and retained the dominion of the house which she inhabited before her removal. That case is very like the present: *here the pauper during his absence [*159] lodged in the workhouse, and must have been subject to the constraint of that house. His wife, it is true, continued to reside in the respondent parish during his absence: but the status of her husband, as the head of her family, is the only status material to

(1) *Ante*, p. 221.

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the present question: *Reg.* v. *Pott Shrigley* (1). His status was that of a person living in a state of chargeability in the parish where he had obtained a settlement, and liable to be removed compulsorily to any third parish in which he might have obtained a subsequent settlement. The *animus revertendi*, under these circumstances, will not avail to make him constructively resident in the respondent parish; and indeed, as it was a question of fact whether such *animus* existed, it must be taken that the Sessions, by confirming the order of removal, have decided that question in the negative.

Andrews (with whom was *Palmer*), *contrà*:

The Sessions have drawn no inference from the facts, and have stated them for the express purpose of obtaining the opinion of this Court upon them. *Reg.* v. *Halifax* (2) does not apply; for the pauper here left the respondent parish, and went to the appellant parish, of his own accord, because he was more likely to obtain work there than elsewhere, and returned home when it pleased him, and during his absence could not have been detained a moment in the poor-house against his will.

(He was then stopped by the COURT.)

LORD DENMAN, C.J.:

The observation of *Mr. Bulwer*, that the *animus revertendi*
[*160] is matter of fact, and that *we must take it to have been negatived by the conclusion which the Recorder has come to, is certainly striking. But I think we must take it that the Recorder has asked our opinion as to the existence of this fact; and it appears to me that there is abundant evidence of it. At the same time I think it important that the Sessions should determine the question of *animus revertendi* for themselves.

PATTESON, COLERIDGE and ERLE, JJ. concurred.

Order of Sessions quashed.

1849. *Feb.* 24.

REG. *v.* THE INHABITANTS OF FORNCETT ST. MARY.

[160]

(12 Q. B. 160—167; 18 L. J. M. C. 125; 13 Jur. 729; 3 New Sess. Cas. 477.)

By stat. 1 & 2 Will. IV. c. li. (local and personal, public), the governor, deputy governor and guardians of the poor of the city of Norwich were incorporated; and the Corporation were to have the care and provide for the maintenance of all the poor of the several parishes within the city, and to exercise all the powers of churchwardens and overseers in the management and removal of the poor, and to institute and defend any appeal

(1) *Ante*, p. 233. (2) *Ante*, p. 221.

against any order relating to the poor; and all orders of removal were to be made on the complaint of the Corporation. The Corporation was to apportion the sums to be raised for the relief of the poor among the several parishes, to be paid to the treasurer of the Corporation, and, in fixing the proportion to be raised by the several parishes, were to calculate the same upon the whole annual value of the property liable in the city. Appeals against orders of removal from any parish within the city were to be made on notice to the Corporation.

The Corporation, in 1846, obtained an order to remove a pauper from the parish of St. S. within the city to a parish out of the city. The pauper had resided in St. S. two years next before the application for the order, and in another parish of the same city twenty years immediately preceding the two years.

Held, that Norwich was a "city" "maintaining its own poor," and therefore a "parish" within the Poor Law Amendment Act, 1834 (4 & 5 Will. IV. c. 76), s. 109, and the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1, which Act, by sect. 8, is to be read as one Act with the former Act; and that the pauper having resided five years in the city, though in different parishes, was irremoveable.

On appeal against an order of two justices of the peace of the city and county of the city of Norwich, bearing date 16th November, 1846, for the removal of William Catchpole, his wife and children, from the parish of St. Stephen, in the city and county of the city [*161] of Norwich, to the parish of Forncett St. Mary, in the county of Norfolk, the Recorder confirmed the order, subject to the opinion of this Court on a case, which was stated, in substance, as follows:

The city and county of the city of Norwich extends over thirty-six parishes and six hamlets, the poor of which are maintained out of a common fund raised under the provisions of stat. 1 & 2 Will. IV. c. li. (local and personal, public), "for the better management of the poor in the several parishes and hamlets in the city of Norwich and county of the same city," the said parishes and hamlets not being severally charged with the maintenance of their own poor. The order in question was obtained by the guardians of the poor of the said city, who, by the 11th section of the said Act, are incorporated by the name of "The governor, deputy governor, and guardians of the poor of the city and county of Norwich and liberties of the same." The pauper, William Catchpole, had resided in the said parish of St. Stephen for two years next before the application for the said warrant of removal, and had resided in the hamlet of Heigham, in the said city and county of the said city, during the twenty years immediately preceding the said two years, there being no interval between his leaving the said hamlet *of [*162] Heigham and his going to reside in the said parish of St. Stephen.

In September, 1845, the pauper received relief from the appellant

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parish; and he continued to receive such relief up to the middle of August, 1846, when it was discontinued. Upon such relief being discontinued, the pauper applied for relief to the governor, deputy governor and guardians of the poor of the city and county of the city of Norwich, under the provisions of the said Act; who thereupon relieved him by the payment of a sum of money weekly; and he was in the receipt of such relief at the date of the warrant of removal.

It was contended, on behalf of the appellants, that the city and county of Norwich is within the meaning of the word "parish," as interpreted in the 109th section of stat. 4 & 5 Will. IV. c. 76, and that the residence of the pauper in the city and county of the city of Norwich, that is to say, in the said hamlet of Heigham and the said parish of St. Stephen together, for twenty-two years next before the application for the said warrant of removal, rendered him irremoveable under stat. 9 & 10 Vict. c. 66. If the Court should be of that opinion, the warrant was to be quashed; but, if not, it was to be confirmed.

The case was argued in Hilary Term, 1849 (1).

Martin and *Pashley*, in support of the order of Sessions:

The question is, whether the city of Norwich is a "parish" within stat. 9 & 10 Vict. c. 66, s. 1, which enacts that no person [*163] shall be removeable from a *"parish" in which he shall have resided for five years next before the application for the warrant of removal. It will be contended that Norwich is such a parish, because stat. 9 & 10 Vict. c. 66 is by sect. 8 to be construed as one Act with stat. 4 & 5 Will. IV. c. 76, by the 109th section of which "the word 'parish' shall be construed to include any parish, city," &c., "maintaining its own poor, whether parochial or extra-parochial." But it is clear, although Norwich has one common fund for the purpose of maintaining the poor of its several parishes, and is therefore a "parish" in the sense ascribed to that word by stat. 4 & 5 Will. IV. c. 76, that the local Act respects only the internal management and maintenance of the poor for the sake of economy, and that, as respects strangers, for the purposes of removal and settlement, the several parishes within the city remain separate and distinct. This was held in *Rex* v. *St. Michael* (2) to be the construction of stat. 10 Anne, c. 6 (private), the Act by which

(1) January 17th. Before Lord Denman, Ch. J., Patteson, Coleridge and Erle, JJ.

(2) 6 T. R. 536.

the management of the poor of Norwich was formerly regulated, and the provisions of which, so far as regards the present question, were the same as are those of the subsisting Act. There it was held that a pauper, by residing in one parish in Norwich and being rated in another, did not gain a settlement in either. So, in *Rex* v. *Wymondham* (1), it was held that a certificate granted to one parish in the city was discharged by the pauper's subsequent hiring and service in another parish in the city. The parishes of a union under Gilbert's Act, stat. 22 Geo. III. c. 83 (2), are distinct for the purposes of settlement (3); and stat. 4 & 5 Will. IV. c. 76, s. 33, which enables parishes to become *one for the purposes of settlement, contains an express limitation, that it is only "as between such parishes" that a pauper's settlement shall be considered to be in the union; and such a union seems precisely the same as the Norwich Union. Sect. 35 of the local Act enables the Corporation to appoint the churchwardens and overseers of the several parishes to be assessors &c.; sect. 32 recognises chargeability to such parishes; and sect. 88 shows clearly that every order of removal to a place out of the city must in its terms be a removal, not from the city at large, but from some particular parish, hamlet, &c. Stat. 9 & 10 Vict. c. 66, by the enactment (s. 1) that a warrant shall not be granted for the removal of a person from a "parish" after five years' residence there, must by "parish" have intended some place from which a person might have been removed before the Act. Now an order of removal could never have been made from the city of Norwich *eo nomine*; it must always have been made, as indeed the present order is, from the parish in which the chargeability attached.

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Andrews and *Palmer*, *contrà*:

The cases cited do not apply; for the question arises on recent statutes, and is simply this: is Norwich a "city maintaining its own poor?" The main object of the local Act was to get rid of all distinction of parishes, so that the poor should be "the poor of the said city," as they are expressly designated in sect. 31. It is true that the local Act does not abolish the offices of churchwarden and overseer for all purposes: but, by sect. 31, it transfers the duties of those offices to the Corporation "in all or any cases touching or concerning the apprenticing, *maintenance, relief,

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(1) 6 T. R. 552. —A. C.
(2) Repealed by S. L. R. Act, 1871. (3) By sect. 39.

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management, removal, or employment of the poor, or the application of any of the rates made for their use or maintenance." By sect. 42 the guardians, in fixing the proportion of money to be raised by the several parishes, are to calculate the same upon the whole annual value of property, without reference to the number of paupers in the several parishes; so that no individual parish is specially affected by the chargeability of a person within the city. It is clear, therefore, that Norwich is a city maintaining its own poor, and, therefore, also a parish within stat. 9 & 10 Vict. c. 66, s. 1.

(COLERIDGE, J.: Is Norwich a place from which an order of removal might have been made before that statute? It rather appears from sect. 88 of the local Act that the order must be from some particular parish in the city.

Pashley: In the case of a union under stat. 4 & 5 Will. IV. c. 76, s. 33, the order would not be from the union, but from some one of its parishes.)

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

The pauper in this case was removed from the parish of St. Stephen, Norwich, to Forncett St. Mary, in Norfolk. He had resided for two years in the parish of St. Stephen, and for twenty years immediately before that in the hamlet of Heigham in Norwich.

By stat. 1 & 2 Will. IV. c. li. provisions are made under which the poor of the various parishes and places in the city of Norwich
[*166] are maintained out of a joint fund, *raised, by the Corporation of guardians, by assessments according to the value of the property in each parish and place, without regard to the numbers of persons relieved in each. The same course had prevailed under previous Acts of Parliament, which were repealed by stat. 1 & 2 Will. IV. c. li. Notwithstanding this joint fund, it had been decided twice that the parishes and places in Norwich remained, in their relation to other places out of the city, distinct and separate: see *Rex* v. *St. Michael* (1) and *Rex* v. *Wymondham* (2). And the same rule would prevail at this day as to settlements and many other matters. But the question in the present case arises as to the legality of the warrant of removal, under the 1st section of stat. 9 & 10 Vict. c. 66, which provides that "no person shall be

(1) 6 T. R. 536. (2) 6 T. R. 552.

removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years next before the application for the warrant;" and the 9th section, which incorporates into the Act the provisions of stat. 4 & 5 Will. IV. c. 76, among which is sect. 109 of that Act (the interpretation clause), which enacts that "in the construction of this Act" "the word 'parish' shall be construed to include any parish, city, borough, town, township, liberty, precinct, vill, village, hamlet, tithing, chapelry, or any other place, or division or district of a place, maintaining its own poor, whether parochial or extra-parochial."

We are asked to read stat. 9 & 10 Vict. c. 66, s. 1, as if it prohibited the removal of any pauper from any city maintaining its own poor, in which city such person *shall have resided five years. [*167] Norwich is a city maintaining its own poor; and the pauper has resided in that city twenty-two years. On the other hand, it is argued that the part of the interpretation clause above cited does not apply to this case, and that the removal is not from the city, but from the parish of St. Stephen, which distinction was adverted to in *Rex* v. *St. Michael* (1), where, however, the removal was to a parish in Norwich, not from one.

We think the argument of the appellants must prevail, and that we must read the clause in question as if the word "city" was substituted for "parish." The Legislature could hardly intend that, where there is one common fund for the relief of the poor of the city comprising many parishes, which fund is apportioned in the raising it without regard to the number of persons relieved in each parish, and so in truth every removal of a pauper is on behalf of the whole city, a pauper, who by reason of long residence in one part of the city is irremoveable, should become removeable by reason of his changing his abode to another part of the same city; it being quite immaterial to the ratepayers in what part of the city he resides when he is chargeable. The order of Sessions and the warrant must therefore be quashed.

Order of Sessions quashed.

(1) 6 T. R. 538.

1849. *May 2.*

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(12 Q. B. 181—192.)

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A pauper lunatic may be sent to an asylum by order of a justice, under stat. 8 & 9 Vict. c. 126 (1), s. 48, though he has resided, for five years next before the application for such order, in a parish different from that in which the asylum is situate, the case of such removal being an exception to the general enactment of the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1. And justices may afterwards make orders under stat. 8 & 9 Vict. c. 126, ss. 58, 62 (2), adjudging such pauper to be settled in a parish other than that in which he has so resided, and requiring such other parish to pay for maintenance &c.

Quære, whether, if such pauper recovered, and returned to the parish whence he was taken, the order under sect. 58, or the actual removal, would be deemed to cause a break of residence in such parish, disentitling him to the benefit of the five years formerly completed there (3).

ON appeal against two orders made on 30th November, 1847, each by the same two justices, the first order made under stat. 8 & 9 Vict. c. 126 (4), s. 58, adjudicating the settlement of Elizabeth Dunmow, a pauper idiot, to be in the parish of Roxwell, in the Chelmsford Union, in the county of Essex, and the second made under s. 62 of the same statute, ordering the treasurer of the guardians [*182] of the poor of the Chelmsford *Union to pay to the treasurer of the guardians of the poor of the Dunmow Union the sums of 3*l.* 18*s.* 6*d.* and 27*l.* 8*s.* 5*d.*, and also to pay to James Phillips, weekly, for such time as in the said order was mentioned, the sum of 11*s.* for the reasonable charges of the future lodging, maintenance, medicine, clothing and care of the said E. Dunmow, the Sessions quashed both orders, subject to the opinion of this Court upon the following case.

The pauper, who is seventeen years of age, is the legitimate daughter of Thomas Dunmow, who is, and has been since the year 1837, legally settled in the parish of Roxwell in Essex; which parish is comprised in and forms part of the Chelmsford Union. The pauper during all her life has resided with her father, and is unemancipated; and she has not, nor ever had, any other settlement than that derived from her father.

On 9th December, 1846, the pauper, being then an idiot residing

(1) Repealed by 16 & 17 Vict. c. 97, which was in turn repealed by the Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 342. See now ss. 14 and 16 of that Act.—A. C.

(2) See now Lunacy Act, 1890, ss. 288, 289.—A. C.

(3) See Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 4.—A. C.

(4) "To amend the laws for the provision and regulation of lunatic asylums for counties and boroughs, and for the maintenance and care of pauper lunatics, in England."

in and chargeable to the parish of Leaden Roothing, in Essex, which parish is comprised in and forms part of the Dunmow Union, was sent from and at the charge of such parish to a house duly licensed for the reception of lunatics, idiots and insane persons, situate at Bethnal Green, in Middlesex, and commonly known by the name of Warburton's Asylum (of which one James Phillips then was and ever since has been the sole registered and licensed proprietor), and was there received into and confined in the said licensed house by the said James Phillips, pursuant to the order of a justice of the peace for the county of Essex and a certain medical certificate, in the form set forth in stat. 8 & 9 Vict. c. 126, Schedule (E.) No. 1. At the time of *the pauper being so sent to [*183] the said licensed house, and thenceforth up to and at the time of the making of the two orders appealed against, there was no lunatic asylum for the county of Essex.

The pauper had resided in Leaden Roothing with her father, the said T. Dunmow, for more than five years continuously next before her being sent and removed from Leaden Roothing to the licensed house aforesaid. The said T. Dunmow had also resided in Leaden Roothing during all that time, and has ever since continued so to do. From the time of the pauper's reception into the said licensed house on 9th December, 1846, up to and until and upon 30th November, 1847, upon which day the two orders appealed against were made, she continued to be confined therein, and during all that time was maintained therein at the expense of, and was actually chargeable to, Leaden Roothing.

At the trial of the said appeal, the appellants contended that the two orders appealed against were bad, upon the ground that, the pauper having resided with her father in Leaden Roothing for five years next before her removal into the said licensed house, and having from the time of such removal into the said house, and while she was residing and was confined therein as aforesaid, and during the time aforesaid, continued, until and upon the day of the making of the two orders, to be chargeable to, and to be maintained in such licensed house at the expense of, Leaden Roothing, the justices were, by stat. 9 & 10 Vict. c. 66, deprived of all jurisdiction to make either of the said orders. The Sessions, being of this opinion, quashed the orders, subject to the opinion of this Court upon the point. If this Court should be of opinion that, upon the facts *stated, the justices were, by stat. 9 & 10 Vict. c. 66, deprived [*184] of the power to make the said orders or either of them, the order

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of Sessions was to be confirmed. If this Court should be of a contrary opinion, the order of Sessions was to be quashed, and the two orders appealed against to be confirmed.

Rodwell and *F. Walford*, in support of the order of Sessions:

The pauper had acquired the privilege of being irremoveable, under stat. 9 & 10 Vict. c. 66, s. 1, by five years' residence. Then the question is, whether an order of justices, adjudicating settlement under stat. 8 & 9 Vict. c. 126, sect. 58 (1), and a like order directing payment for maintenance under sect. 62 (2) of the

(1) Stat. 8 & 9 Vict. c. 126, s. 57, enacts: "That when any pauper lunatic shall be confined under the provisions of this Act he shall, for the purposes of this Act, be deemed to [*185, *n.*] belong to and continue chargeable to the parish from which, or at the instance of some officer or officiating clergyman of which, he shall have been sent, until such parish shall in due course of law, as in the case of any other pauper, have established that such lunatic is settled in some other parish, or that it cannot be ascertained in what parish such lunatic is settled, and that every pauper lunatic who is chargeable to any parish shall, whilst he shall reside in an asylum, be deemed, for the purposes of his settlement, to be residing in the parish to which he is chargeable." (See now Lunacy Act, 1890, s. 286.)

Sect. 58 enacts: "That it shall be lawful for any two justices for the county or borough in which any asylum, registered hospital, or licensed house is situate, or to which such asylum shall wholly or in part belong, or from any part of which any pauper lunatic shall have been sent, at any time to inquire into the last legal settlement of any pauper lunatic confined or ordered to be confined therein; and if satisfactory evidence can be obtained as to such settlement in any parish, township, or place, such justices shall, by order under their hands and seals, adjudge such settlement accordingly." (See now Lunacy Act, 1890, s. 288.)

(2) Sect. 62 enacts: "That if, after any lunatic shall have been sent to an asylum, registered hospital, or licensed house, it shall be adjudged that such lunatic is settled in a parish different from the parish from which, *or at the instance of some clergyman or officer of which, he was sent to such asylum, hospital, or house, then and in such case it shall be lawful for any two justices of the county from any part of which any lunatic shall have been sent, or for any two justices, members of the committee of visitors of such asylum, to make an order or orders upon the treasurer of the guardians of the union, including any parish, or of any parish or the overseers of the parish in which such lunatic shall be so adjudged to be settled, for payment to the treasurer of the guardians or overseers of the first-mentioned union or parish of all expenses incurred by or on behalf of such union or parish in or about the examination of such lunatic, and his conveyance to the asylum," &c., "and of all moneys paid by the treasurer" &c., "or the overseers" &c., "to the treasurer, officer, or proprietor of the asylum," &c., "for the lodging, maintenance," &c., of such lunatic, incurred within twelve months previous to the order, "and also for payment to the treasurer," &c., of the reasonable charges of the future lodging, maintenance," &c. "of such lunatic;" and every treasurer of guardians, or overseer, on whom such order shall be made, shall pay &c. "Provided always, that the guardians of any union, or parish, or the over-

same Act, are equivalent to such a *removal as is prohibited by stat. 9 & 10 Vict. c. 66. If so, the two orders now in question are invalid. And the language of the prior statute clearly leads to that conclusion. By sect. 57 the pauper lunatic confined under this Act shall, for the purposes of the Act, be deemed to belong and continue chargeable to the parish from which he is sent "until such parish shall in due course of law, as in the case of any other pauper, have established that such lunatic is settled in some other parish." That must contemplate such proceedings as are commonly instituted for the purpose of a removal: *but the parish of Leaden Roothing could not have instituted those proceedings, the pauper being irremoveable from thence by five years' residence. The inquiry by the justices under sect. 58 is of the same nature as that pointed out by sect. 57. The proviso of sect. 62 puts the order for payment of maintenance under that clause on the same footing as a warrant of removal. ERLE, J. took that view of the enactment in *Ex parte Monkleigh* (1).

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(ERLE, J.: You must confine that to the time when parties have begun an appeal.)

The words of the proviso are large enough to be taken as referring to incidents which might be annexed to an order of removal by a subsequent statute. By sect. 58 the residence is constructively changed. Till the adjudication of settlement the residence is, constructively, in the parish from which the lunatic was sent; the asylum is as it were a part of the parish for that purpose. After the order, the constructive residence is in the parish where the settlement is adjudged to be: therefore there is a complete removal from parish to parish. It is, indeed, provided by stat. 9 & 10 Vict. c. 66, s. 1, "that the removal of a pauper lunatic to a lunatic asylum, under the provisions of any Act relating to the maintenance and care of pauper lunatics, shall not be deemed a removal

seers of any parish, township, or place, affected by such order, may appeal against the same in like manner as if the same were a warrant of removal; and in case of such appeal the guardians of the union" &c., "or the overseers of the parish" &c., "or the clerk of the peace of the county to which such lunatic was chargeable before such order was made, may defend such appeal, and the persons appealing or intending to appeal, and the persons defending such appeal, shall have all the same powers, rights, and privileges, and be subject to the same obligations, in all respects as in the case of an appeal against a warrant of removal." (See now Lunacy Act, 1890, s. 289.)

(1) 5 Dowl. & L. 404, 411.

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within the meaning of this Act:" but that relates only to the physical "removal" of the lunatic (so termed in sect. 48 of stat. 8 & 9 Vict. c. 126) when he is carried from the place where he *is found to an asylum. The object of such a proviso is clearly that, where it is necessary to send a lunatic to an asylum under stat. 8 & 9 Vict. c. 126, the power may not fail because he has resided five years in the parish. If the present orders could legally be made notwithstanding the Act 9 & 10 Vict. c. 66, then, if the pauper recovered and went back to Leaden Roothing, she would be removeable. There would have been a break in the residence; and, though she had continued there five years, the interruption would have the same consequence as in *Reg.* v. *Salford* (1), and *Reg.* v. *Pott Shrigley* (2).

(PATTESON, J.: The time passed in the lunatic asylum would not count for that purpose.)

If the asylum were in the parish, that would be so; but the orders change that state of things. There is no longer a residence within the enacting clause of sect. 1.

(PATTESON, J.: I have asked on another occasion, but it does not seem to be clear, what is the situation of a lunatic pauper who, being in an asylum under orders of this kind, is cured, and then wishes to reside in his former parish. The two orders here are certainly not altogether equivalent to an order of removal; for, if the pauper recovered, the overseers of Leaden Roothing would not be justified in taking her by force to Roxwell, though Roxwell is saddled with the charge of her maintenance in the asylum.

WIGHTMAN, J.: Under sect. 57, the pauper was to be deemed resident in Roxwell; but that was only for the purpose of charging Roxwell.

ERLE, J.: A fictitious residence is created by the Act. According to the latter words of sect. 57, the pauper is to be deemed residing

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in the parish to *which he is chargeable, "for the purposes of his settlement:" but the five years do not affect "settlement.")

The enacting clause of stat. 9 & 10 Vict. c. 66, s. 1, cannot be limited to cases of ordinary removal: and, if the Legislature thought it necessary to provide that the mere transfer of the

(1) 12 Q. B. 106 (see *ante*, p. 231, note (1)). (2) *Ante*, p. 233.

pauper to a lunatic asylum should not be deemed a removal because, after the Act passed, it might be considered illegal, *a fortiori* they cannot have contemplated that, in a case within the enacting clause, orders should be made which would constructively, for the purposes of settlement, change the residence from one parish to another. Stat. 9 & 10 Vict. c. 66, gives a privilege to the place of settlement, when the pauper has resided five years in a different place. Here, the parish of Roxwell was exempt from maintaining the pauper as long as she chose to reside in Leaden Roothing. By the construction attempted on the other side the orders of adjudication and maintenance indirectly take away that advantage.

Hawkins (with whom was *Parnell*), *contrà*:

In stat. 9 & 10 Vict. c. 66, the case of a lunatic pauper is considered; yet no intention is expressed of changing the law established by the former Act. There is no ground for saying that this statute contemplates any privilege to be enjoyed by the pauper's original parish; it would be one which the pauper himself could at any time take away by changing his residence. The only privilege conferred is on the pauper; the object being (as appears from sect. 5) to prevent removals, but without altering settlements. If *Reg.* v. *Salford* (1) *and *Reg.* v. *Pott Shrigley* (2) applied, they would [*189] prove too much; for it would follow that the residence here was broken as soon as the pauper went out of Leaden Roothing. But in fact it is for the purposes of settlement only that residence in the asylum becomes constructively a residence in the parish to be charged. If sect. 57 is considered in that point of view, there appears nothing to prevent adjudging the settlement of the pauper as a lunatic, though there has been a five years' residence in Leaden Roothing.

(PATTESON, J.: If the orders of settlement and maintenance prevent the pauper, when he recovers, from returning to the parish where he was residing, he is prejudiced by them: but he certainly is not if the proviso as to a lunatic in stat. 9 & 10 Vict. c. 66, s. 1, means that the constructive residence in a different parish shall not cause a break of the residence in the first parish.)

The clause may be so read; and then, in reckoning the five

(1) 12 Q. B. 106 (see *ante*, p. 231, note (1)). (2) *Ante*, p. 233.

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years, the period passed in the asylum will be laid entirely out of consideration, and consequently the reasoning adopted in *Reg.* v. *Salford* (1) and *Reg.* v. *Pott Shrigley* (2) (and adverted to in *Reg.* v. *St. Ebbe's* (3), that the enacting clause of sect. 1 never attached, and therefore there could be no computation of five years at all, will be inapplicable. It has not been contended that the constructive residence in the place of settlement is a residence that could give irremoveability there; neither then can it prevent irremoveability in the former parish. The residence has no bearing on that subject, and is for a limited purpose only. That purpose regards [*190] the place of settlement, which is to provide for the pauper, not *the place of the former residence. The proviso of stat. 8 & 9 Vict. c. 126, s. 62, applies only to the conduct of appeals.

(ERLE, J.: It is a direction as to procedure.

WIGHTMAN, J.: The order is to be appealed against "in like manner as if the same were" a warrant of removal.)

And the parties to the appeal are to have the same rights and be under the same obligations "as in the case of" an appeal against a warrant of removal.

(He was then stopped by the COURT.)

PATTESON, J. (4):

The construction of stat. 8 & 9 Vict. c. 126, is quite clear. By the general provision of that Act, sect. 48, a justice may, on certain notice, order a pauper lunatic to be removed to a county asylum or licensed house. That power of removal is saved by stat. 9 & 10 Vict. c. 66, s. 1; and, if the enactments stopped here, the removal of a pauper lunatic would clearly not be prohibited by reason of a five years' previous residence. But then it is said that the order adjudicating settlement, and the order of maintenance, under sects. 58 and 62 of stat. 8 & 9 Vict. c. 126, have the effect of a removal, such as stat. 8 & 9 Vict. c. 66, does prohibit. I am not of that opinion. That statute does not allude to the prior Act farther than by providing that removal under it to a lunatic asylum "shall not be deemed a removal within the meaning of this Act." The clauses as to adjudication of settlement and ordering of maintenance are not adverted

(1) 12 Q. B. 106 (see *ante*, p. 231, note (1)).

(2) *Ante*, p. 233.

(3) *Ante*, p. 230.

(4) Lord Denman, Ch. J., was absent on account of ill health.

to. The effect of stat. 8 & 9 Vict. c. 126, standing by itself, is that the parish where the pauper is found to be settled, not the parish where he shall have been residing, is to maintain him; the orders for *ascertaining the settlement being made by two justices of the county or borough in which the asylum is or from which the lunatic shall have been sent, the order imposing the payments by two justices of the county from which the lunatic shall have been sent, or two justices from the committee of visitors of the asylum. These provisions are untouched by the subsequent Act. What the effect of the orders may be when the lunatic recovers and goes back to the former place of residence, it is not necessary to say. According to the principle adopted in *Reg.* v. *Salford* (1), I should say that, when the residence in the asylum was in fact out of the former parish, there was a break of the five years' residence (2); but that would be independent of any peculiar effect of the adjudication of settlement and order of maintenance. If so, those orders make no difference, and there is no reason that they should be prohibited by stat. 9 & 10 Vict. c. 66: and in fact they are not touched by it.

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WIGHTMAN, J.:

I am of the same opinion. The case has been argued on the part of the appellants as if parishes rather than paupers were entitled to the benefit of stat. 9 & 10 Vict. c. 66. But the provisions of that Act against removals are clearly for the benefit of the paupers. Here the pauper had been resident five years in Leaden Roothing, but was removed as a lunatic. The power of justices to remove in such a case is expressly preserved by the first proviso of stat. 9 & 10 Vict. c. 66, s. 1; therefore this is not one of the removals prohibited by that Act, and the magistrates have power to remove. *Then the question arises whether they have power to ascertain and adjudge, according to the provisions of stat. 8 & 9 Vict. c. 126, who is liable to pay the expenses of removal and subsequent maintenance, and to order such payment; and I find nothing in the Act of 9 & 10 Vict. which interferes with that power. Whether on any future occasion these orders may be considered as causing a break in the five years' residence, it is not necessary at present to inquire (2).

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ERLE, J.:

The only question here is whether the order of adjudication and order of maintenance are valid. By stat. 8 & 9 Vict. c. 126, the

(1) 12 Q. B. 106 (see *ante*, p. 231, note (1)).

(2) See Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 4.—A. C.

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lunatic being lawfully in an asylum or licensed house, two justices are authorised to make orders adjudging the settlement and directing payment for the maintenance: and the place of settlement is the place on which the latter order is to be made. Then, does stat. 9 & 10 Vict. c. 66, interfere with these powers? The intention of that Act was to give a privilege to the persons residing, not to parishes, except so far as benefit to them necessarily followed the exemption given to individuals. But it is expressly enacted that the statute shall not affect removals of lunatics; and nothing is said to prohibit making the subsequent orders as before the Act passed. Whether the removal from a parish under stat. 8 & 9 Vict. c. 126 makes a break in residence, is not now to be decided: nor need we consider whether the imaginary residence under the order adjudging settlement takes away the right previously acquired by five years of actual residence (1). The grounds I have already stated satisfy me.

Order of Sessions quashed.

1849. *May* 12.

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REG. *v.* THE INHABITANTS OF BARNSLEY.

(12 Q. B. 193—205; S. C. 18 L. J. M. C. 170; 13 J. P. 329.)

Under stat. 8 & 9 Vict. c. 126, s. 48 (2), it is not necessary that a lunatic, chargeable to a parish, should be sent to an asylum or licensed house. The justice before whom he is brought is to decide whether he is a proper person to be confined or not; and, if not confined, he may be removed to his parish as an ordinary pauper.

An idiot, aged thirty-three, living with his parents in parish B., became chargeable; and thereupon he and they were removed by order of justices to parish T., their place of settlement. The order was never appealed against. The father retained his house in B., in the care of two of his children, who were emancipated; and, when removed, he intended to return as soon as he could. After four days, the paupers did return to the house in B. with the consent of the overseers of T., who promised to send weekly relief to the parents for the son: but the son again became chargeable to B.; and another order was made, finding the son and parents chargeable, and ordering their removal to T. The family had resided in B. for five years next before the making of this order, excepting only the four days above mentioned. On appeal (not stating as a ground that the parents were not chargeable at the date of the second order), and case stated by the Sessions:

Held that the five years' residence was broken by the removal to parish T., and that the paupers were not irremoveable from B. under the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1.

ON appeal against an order of justices, dated 22nd September, 1847, for removing Thomas Watson, Jane his wife, and James

(1) See Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 4.—A. C.

(2) See now Lunacy Act, 1890 (53 & 54 Vict. c. 16), ss. 14—16.—A. C.

their son, from the township of Barnsley in the West Riding of Yorkshire to the parish, township or place of Tamworth in the counties of Warwick and Stafford, the Sessions quashed the order, subject to the opinion of this Court upon a special case.

The case first set out the order of removal, which recited, and adjudged to be true, a complaint that the three paupers had come to inhabit and were now residing in Barnsley, not having gained a legal settlement &c., "and are now actually become chargeable to, and receiving relief from," Barnsley.

So much of the examinations as is now material was as follows. "Thomas Watson" (the pauper) "saith: 'I was married at Barnsley old church in the West Riding about forty-eight years ago to Jane Flint, my now wife, by whom I have six children living. All of them are now emancipated except my son James, aged *thirty- [*194] three, who is an idiot, and resides with me and my said wife, and forms part of my family.'"

The case then stated the grounds of appeal deemed material; of which the following only need now be set forth (1).

3. That, when the application for the said order was made, the said Thomas Watson and his said wife and son had resided in your said township of Barnsley for five years and upwards next before the making of the said application, within the true intent &c. of the statute &c. (9 & 10 Vict. c. 66), and were irremovable when the said order was applied for and made.

4. That the order is illegal and void, so far as it respects James the son, and that such illegality appears by the examinations, the said James being therein stated and shown to be a lunatic; and that, in truth and in fact, the said James, when the said order was applied for and made, was a lunatic within the true intent &c. of stat. 8 & 9 Vict. c. 126 (2): and that therefore the said James was not liable to be removed by such order.

On the trial of the appeal, the settlement in Tamworth was admitted. It was also admitted that an order of removal, dated 18th July, 1842, was duly made for the removal of the same paupers from Barnsley to Tamworth, the execution of which order was suspended on the same day by reason of the illness of James; and that two justices in and for the West Riding made a further order on 7th August, 1844, directing the order of July 18th, 1842,

(1) The first alleged generally that the order was bad on the face thereof: the second, that the caption of the examinations did not show a proper complaint, or jurisdiction in the justices.

(2) See now Lunacy Act, 1890 (53 & 54 Vict. c. 5).—A. C.

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to be forthwith executed, and costs *of suspension to be paid by Tamworth to Barnsley; and that the paupers were duly removed, under the said order of July, 1842, to Tamworth, and were there accepted, and the costs paid; and that that order of removal has never been appealed against.

[*195]

It was also admitted that all the said paupers were, upon their said reception by the said overseers of the township of Tamworth, placed in their workhouse at Tamworth, and supported there at the expense of the said township of Tamworth for four days under the said order, and that the overseers of Tamworth, at the end of the four days, gave a sovereign to Thomas Watson in order to pay the expenses of himself, and his wife and idiot son on their return to Barnsley, and promised to send the pauper T. Watson 5*s*. 6*d*. a week for the future maintenance of his said son James; and which said weekly sum has been so sent to him by the said overseers of Tamworth from that time up to November, 1846; but that the overseers of Tamworth had never sent any money to the said T. Watson for himself or his said wife since the date of the said order, except as above mentioned.

The pauper, T. Watson, who was called as a witness on the trial of the appeal, stated as follows. "I and my wife were sent with my son, because the justices thought we were the properest persons. I meant to come back as soon as I could get. I did not know how long I should have staid there unless I had been relieved. I should have come back the best way I could. I should have been able to get back as soon as I could" (1). It was also admitted at the trial of the said appeal, that, during the paupers' absence from Barnsley, *and during their residence at Tamworth under the said order of removal, the said pauper, T. Watson, retained his house at Barnsley in the care of two of his children, who were at that time twenty-one years of age, and maintaining themselves, and living in the same house with the said T. Watson.

[*196]

The case then stated that the appellants took four objections, all of which the Sessions held valid, subject to the opinion of this Court. The first two were not urged on the argument in Banc (2).

The appellants thirdly objected, under the third ground of appeal, that it appeared by the examinations that the pauper, James Watson.

(1) *Sic.*

(2) The first two, under the first and second grounds of appeal, related to the omission to negative, in the order of removal and in the complaint recited by caption, a five years' residence in Barnsley.

was an idiot at the time when the said examinations were taken; and that it was not competent to remove an idiot under an ordinary order for the removal of the poor.

The appellants lastly objected, under their fourth ground of appeal, that the paupers were irremovable at the time of granting the said order then appealed against, by reason of their having resided in Barnsley five years next before the application for the said order. The respondents admitted that the paupers were irremovable by reason of such residence, unless their removal to Tamworth under the said order of removal of 18th July, 1842, and their residence in the said workhouse in Tamworth, and their return to Barnsley under the circumstances above stated, constituted a break in the said residence of five years next before the application for the order then appealed against: but they contended that the above circumstances did create *a break in the said five years' residence, and that the paupers were removable. [*197]

If the Court of Queen's Bench should be of opinion that any of the said objections, except the said third objection, was valid, the said order of Sessions was to be confirmed; otherwise to be discharged. If the Court of Queen's Bench should be of opinion that the third objection was valid, then the said order of Sessions, so far as regarded the removal of the said James Watson, was to be confirmed: otherwise, the said order, as far as regarded the removal of James Watson, to be discharged.

Pashley and *Boothby*, in support of the order of Sessions:

First, an idiot (who, by the interpretation clause, sect. 84 (1), of stat. 8 & 9 Vict. c. 126, is a "lunatic" within that Act) cannot be removed by a common order of justices, but must be sent to an asylum or licensed house according to sect. 48 (2). That clause directs imperatively that "the medical officer of every parish" &c. "who shall have knowledge that any person chargeable to such parish" &c. "is or is deemed to be lunatic, shall within three days after obtaining such knowledge give notice thereof in writing to the overseers;" and every overseer who shall have such knowledge, by the notice before mentioned or otherwise, "shall within three days after obtaining such knowledge give notice thereof" to a justice; and the justice "shall" order the overseer &c. to bring such person before him, and "shall" call to his assistance a

(1) See now Lunacy Act, 1890 (53 & 54 Vict. c. 5), s. 341.—A. C.

(2) Lunacy Act, 1890, ss. 14—16.—A. C.

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physician, &c.; and, if the justice shall, on examination &c., be satisfied that such person is lunatic, and such physician &c. shall sign a certificate &c., such justice *"shall, by an order under his hand," direct such person to be received into the asylum &c. for the county or borough, or, if there be no asylum, into a licensed house &c.

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(PATTESON, J.: Do you say that, if a pauper child is an idiot and harmless, the overseers are bound to take it from its parents and send it to an asylum?)

The words seem to leave no option. If the pauper is to be removed at all, it must be in this way. * * *

[199] Secondly, the five years' residence of the father and mother was not broken; for the examinations show that the justices, in 1842 and 1844, sent them to Tamworth *only because they were thought the properest persons to accompany the son.

[*200]

(PATTESON, J.: The examinant swears to what passed in the minds of the justices when they made an order.)

The Sessions have come to a conclusion; and, if there be any ground for it, the Court will not disturb it.

(COLERIDGE, J.: We must treat that order of removal as good, now it is made. The motive of making it cannot alter its effect.)

Two late cases, which seem adverse to the appellants, may be distinguished. In *Reg.* v. *Halifax* (1) the pauper had been effectually removed, though only for a few days, and though she retained a cottage in the place of her former residence, and always wished to return, and did ultimately return, to that cottage. The COURT held that the desire to return, without the right, was different from the *animus revertendi* which, in some cases, keeps up the continuity of residence. Here the right as well as the desire remained: and the pauper T. Watson continued to occupy the house in Barnsley by his children.

(PATTESON, J.: They were emancipated.)

The father occupied the house by their agency. In *Reg.* v.

(1) *Ante*, p. 221.

Halifax (1) the pauper could not return home without being chargeable: here the paupers were not chargeable on their return, if it is rightly argued that T. Watson was not rendered so by the relief to James. *Reg.* v. *Seend* (2) is distinguishable from this case on precisely the same grounds. In *Reg.* v. *Tacolnestone* (3), where a pauper voluntarily left the parish of his residence, his family remaining there, and obtained employment from another parish, where he was lodged in the workhouse, and returned after a few weeks, the **animus revertendi* was considered to prevent a break in the residence. That shows that mere absence for the purpose of obtaining support from another parish does not defeat the five years' residence, and that, to ascertain whether a break has been effected or not, all the circumstances will be looked at. And the facts here are as favourable to the continuity of residence as those in the last cited case.

[*201]

Overend, contrà:

The order of 1842, unappealed against, establishes conclusively that all the paupers were then chargeable. The evidence as to the reasons for making the order ought to have been expunged from the case. Then the removal to Tamworth was a break in the residence, according to *Reg.* v. *Halifax* (1) and *Reg.* v. *Seend* (2). *Reg.* v. *Tacolnestone* (3), where there was no order of removal, does not bear on this case. (He was here stopped by the COURT as to this point.) The argument on stat. 8 & 9 Vict. c. 126, which passed in 1845, can apply only to the order now appealed against. The prior Act, 9 Geo. IV. c. 40, in the sections (38 and 44) corresponding to sects. 48 and 49 of the present Act, did not oblige justices to send the lunatic to an asylum or licensed house, unless they thought fit. Stat. 8 & 9 Vict. c. 126, s. 48, uses imperative words; but the justice's order for confinement is to be according to the form in Sched. (E.) No. 1, and there the justice is made to state that he, "being satisfied that the said A. B. is a lunatic" &c., "and a proper person to be confined," directs that he be received into the asylum &c. Therefore, although *the party be chargeable, the justice is to exercise a discretion. The lunatic might be of full age, and yet not, in the opinion of the physician, a proper person to be confined. It could not then be said that he was not legally removeable as a pauper. * * *

[*202]

(1) *Ante*, p. 221.
(2) *Ante*, p. 227.
(3) *Ante*, p. 238.

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PATTESON, J. (1):

As to the break in residence, it is impossible to distinguish this case from *Reg.* v. *Halifax* (2) and *Reg.* v. *Seend* (3). We must take it that the magistrates who made the first order in this case were [*203] satisfied that Thomas, the father, was chargeable. *What satisfied them, is a question we cannot enter into. The reason of removal assigned in Thomas Watson's examination, that the justices thought the parents the most proper persons to go with their son, is too vague to have any effect. We must look upon it as conclusively shown that the father was chargeable, and that the wife and idiot son were removed as part of his family. The question which has been raised, whether a father is chargeable on account of relief furnished in respect of an idiot son only, does not arise. We do not know whether the order of 1842 was grounded on any such chargeability. Then the cases have decided that, where a person becomes chargeable, and an order of removal is made and carried into effect, the absence, under such removal, will break a five years' residence. The magistrates who made the present order have adjudged the father, as well as the wife and son, to be chargeable. If the father meant now to insist that he was not removeable because the relief was given in respect of the son only, he should have appealed on the express ground that he was not chargeable. The other point depends on the construction of stat. 8 & 9 Vict. c. 126. And sect. 48, and the Schedule (E.) No. 1, there referred to, show that two classes of pauper lunatics are contemplated; those "proper" "to be confined," and those fit to be at large. It is not proved here that the pauper James was not of the latter class. The Sessions find, in effect, that a pauper lunatic cannot, under any circumstances, be removed to a parish as his settlement. The clauses referred to show that this is clearly wrong. And sect. 55, and the form of certificate in Sched. (F.), there mentioned, [*204] *support this conclusion (4). As to the argument that an idiot cannot be removeable because he can have no *animus morandi*, a person may be unfit for the common affairs of life, and yet capable of an intention to remain in a place. The case of *Rex* v. *Woolpit* (5) was peculiar in its circumstances. With respect to the distinction between a chargeable lunatic who is a member of a family and one

(1) Lord Denman, Ch. J. was absent on account of illness.

(2) *Ante*, p. 221.

(3) *Ante*, p. 227.

(4) *Pashley* suggested that sect. 55 might be explained by reference to sect. 8.

(5) 4 Ad. & El. 205.

who is not, there may be such a distinction; I am not aware that it is material: but, if there be a difference, I think it is not in favour of the argument for the appellants.

COLERIDGE, J.:

The proposition, as it has been put, that a pauper lunatic can under no circumstances be removed to his parish, cannot be sustained. Stat. 8 & 9 Vict. c. 126, contemplates two classes of lunatics, those fit to be confined and those who are not. Those fit to be confined are, imperatively, to be dealt with as sect. 48 directs: and, if the decision here had been that, under the circumstances of this case, the lunatic could be dealt with only under that clause, the question would have been different. The forms in Sched. (E.) No. 1, both comprise, as well as the term "lunatic," the terms "a proper person to be confined," as necessary to the order or the medical certificate. I am glad that this is so; for it prevents the hardship that would exist if a harmless idiot, living comfortably in the place of his settlement, were necessarily and compulsorily to be sent to *a lunatic asylum. That is not the law; but the magistrates are to determine whether or not it is requisite that the lunatic should be so confined. As to the five years' residence, I think there was a complete break. The order of 1842 removed the father, mother and son as being all chargeable; and in 1844 all were actually removed. There was no appeal. Unless the order was made wholly without jurisdiction, it was conclusive; and the residence was *de facto* broken by a valid order for the actual removal, in 1844. There were indeed two sons of the pauper Thomas left in the house; and it is suggested that he himself intended to return, and did in fact return after a short absence; and that the relief, whenever given, was confined to the lunatic son. But there is no authority for saying that these facts prevent a break of residence. The intention to return cannot have any weight here; the question is, if there was a right of returning; which there might have been if the order had been bad in itself or made without jurisdiction. A chargeability *de facto* continued after the return. It is argued that that applies only to the lunatic son; but, on the face of the order, we must take it that the relief was relief to the father in respect of the lunatic son's chargeability.

[*205]

WIGHTMAN, J. concurred on both points.

Order of Sessions quashed.

1848.
Feb. 12.
April 15.
May 30.

[217]

RUSSELL *v.* SMITH (1).

(12 Q. B. 217—239; S. C. 17 L. J. Q. B. 225; 12 Jur. 723.)

Quære, whether the protection given by the Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 20, 21, and the Dramatic Copyright Act, 1833 (3 & 4 Will. IV. c. 15), ss. 1, 2, to the author of any "dramatic piece or musical composition" against piracy by unauthorised performance, extends to musical compositions if they be not dramatic in their nature, or performed at a place of dramatic entertainment. But, assuming these conditions to be essential,

A song which relates the burning of a ship at sea, and the escape of those on board, describes their feelings in vehement language, and sometimes expresses them in the supposed words of the suffering parties, is dramatic, and therefore at all events within the meaning of the statute, though it be sung only by one person, sitting at a piano, giving effect to the verses by his delivery, but not assisted by scenery or appropriate dress.

And a room where the song is performed, and to which persons paying for tickets are admitted for the purpose of hearing it, is, for the time, a place of dramatic entertainment within the meaning of the statutes, though the room be ordinarily used for different purposes.

The proprietor of such musical composition may maintain an action for infringement of his exclusive right to perform it, without having first registered it according to the Copyright Act, 1842, s. 13.

A declaration in debt for penalties in respect of such infringement is good after verdict, though it state only that, at the time &c., "the plaintiff had, and still hath, the sole liberty of representing and performing a certain musical composition, called" &c.; not stating how he is entitled to such liberty, nor qualifying the assertion of it by the words "at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom" &c., used in the Dramatic Copyright Act, 1833, s. 1. For it is sufficient, at this period of the proceedings, that the count follows the words of the Copyright Act, 1842, s. 20, which confers the right.

DEBT. The declaration stated that, after the passing and coming into operation of stat. 3 & 4 Will. IV. c. 15, "to amend the laws relating to dramatic literary property," and stat. 5 & 6 Vict. c. 45, "to amend the law of copyright," and before and at the time of the wrongful representation and performance by the defendant as hereinafter mentioned, the plaintiff had, and still hath, the sole liberty of representing and performing a certain musical composition, called, to wit, "The Ship on Fire." "Yet the plaintiff saith that, after the passing," &c. "of the said Acts of Parliament, and whilst the plaintiff had such sole liberty of representing and performing the said musical composition as aforesaid, and before the commencement of this suit, to wit on the 22nd day of December, A.D. 1845, and within twelve calendar months now last past, the defendant did, contrary to the true intent and meaning, and against the

(1) Foll. *Clark* v. *Bishop* (1872) 25 L. T. 911; cited *Wall* v. *Taylor* (1882) 9 Q. B. D. 727, 731, 51 L. J. Q. B. 547 (affd. 11 Q. B. D. 102, 52 L. J. Q. B. 558); and *Duck* v. *Bates*, 12 Q. B. D. 79, 83, 53 L. J. Q. B. 97 (affd. 13 Q. B. Div. 843, 53 L. J. Q. B. 338). — A. C.

provisions *in that behalf, of the said Acts of Parliament, and without the consent in writing of the plaintiff first had and obtained, to wit at a place of dramatic entertainment in that part of the United Kingdom" &c. "called England, to wit at Crosby Hall, in the parish of St. Helen, Bishopsgate, in the city of London, wrongfully and injuriously represent and perform the said musical composition, contrary to the form, true intent and meaning, and against the provisions in that behalf, of the statutes in such case made and provided: whereby, and by reason of the premises, and according to the provisions and under and by virtue of the said statutes, he the defendant forfeited, and hath become and still is liable to pay to the plaintiff, the sum of 40*s.* for the said offence; and whereby, and by reason of the premises, an action hath accrued to the plaintiff to have and demand of and from the defendant by virtue of the said statutes the aforesaid sum of 40*s.*" &c.

Plea: *Nil debet.* Issue thereon.

On the trial, before Erle, J., at the sittings in London after Easter Term, 1847, it appeared that the plaintiff was the composer of a song called "The Ship on Fire," and was accustomed to sing it at public concerts. The song described a ship taking fire at sea, the distress, and finally the escape, of the persons on board, and their words and actions during the several incidents (1). The

(1) Part of the song was as follows:

"There was joy in the ship as she furrowed the foam,
For fond hearts within her were dreaming of home.
The young mother press'd her fond babe to her breast,
And sang a sweet song as she rock'd it to rest,
And the husband sat cheerily down by her side,
And look'd with delight in the face of his bride.
'O happy,' said he, 'when our roaming is o'er,
We'll dwell in our cottage that stands by the shore.'"

* * * *

"Hark! what was that? Hark, hark to the shout.
Fire! then a tramp and a rout,
And an uproar of voices arose in the air:
And the mother knelt down, and the half spoken prayer
That she offered to God in her agony wild,
Was 'Father, have mercy, look down on my child!'
She flew to her husband, she clung to his side:
Oh! there was her refuge, whate'er might betide.
Fire! Fire! it was raging above and below."

* * * *

"'Twas vain o'er the ravage the waters to drip;
The pitiless flame was the lord of the ship; [219, *n.*]
And the smoke in thick wreaths mounted higher and higher.
'Oh God! it is fearful to perish by fire,
Alone with destruction, alone on the sea,
Great Father of mercy, our hope is in Thee.'
Sad at heart and resigned, yet undaunted and brave.

RUSSELL v. SMITH.

plaintiff sang it at a piano, and sitting, but gave dramatic *effect to the various passages, by tone of voice and otherwise. A witness conversant with music stated that he considered the song descriptive and dramatic. The defendant, without authority from the plaintiff, sang the same song, among others, at an entertainment which he opened at Crosby Hall, Bishopsgate, and to which he gave admission by shilling and two shilling tickets. He announced the performance by handbills, styling it Mr. Henry Smith's "vocal entertainment interspersed *with anecdotes," and giving a list of the pieces to be executed, among which was "The Ship on Fire," designated there as a "descriptive scena." Other parts of the entertainment were characterised in similar words (1). The prices of tickets were stated. The building called Crosby Hall belongs to a literary institution, and contains a large room in which elocution classes meet periodically, but which, at other times, is let out for concerts and musical entertainments. It has been hired for recitations intermixed with songs, and for performances of ventriloquy. A music license is taken out for it, under stat. 25 Geo. II. c. 36. When the defendant performed, the Hall was fitted up with seats

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[*220]

They lowered the boat, a mere speck on the wave.
First entered the mother, enfolding her child:
It knew she caress'd it, looked upward and smiled.
Cold, cold was the night as they drifted away,
And mistily dawn'd, o'er the pathway, the day:
And they pray'd for the light, and at noontide about
The sun o'er the waters shone joyously out.
'Ho! a sail! Ho! a sail!' cried the man on the lee:
'Ho! a sail!' and they turn'd their glad eyes o'er the sea.
'They see us, they see us, the signal is waved:
They bear down upon us: thank God we are saved.'"

(1) The description of the entertainment in the defendant's bills was as follows:

"Programme. Part I. Descriptive ballad, 'Land ho:' words by G. P. Morris of New York." (Here a verse was introduced.) "This song is intended to describe the joy of passengers after a long and tedious voyage across the Atlantic. Descriptive scena, 'The Dream of the Reveller:' a temperance song: words by Charles Mackay. Ballad: 'Woodman, spare that tree:' words by G. P. Morris. Descriptive cantata, 'The Shipwreck,' third time, by Alexander Johnson, Esquire. Descriptive cantata, 'The Maniac:' words by Monk Lewis. Song: 'The Boatman of the Ohio:' a national American or negro melody. Part II. Descriptive scena, 'The Gambler's Wife.' Descriptive song, 'The Newfoundland Dog:' words by F. W. N. Bayley, founded upon an incident that occurred on board an East Indiaman on her homeward voyage in the year 1841. Song, 'I'm afloat, I'm afloat,' The Rover's song: words by Eliza Cook. Descriptive scena, 'The Ship on Fire:' words by Charles Mackay, Esquire. This scene is founded upon the loss of the *West* East Indiaman, which was totally destroyed by fire in the Bay of Biscay. Finale, 'Come along, my Darling:' a national American or negro melody."

for an audience, and a platform for himself; there was no scenery or characteristic dress; the defendant accompanied himself on the piano; and his exhibition was a copy of the plaintiff's.

It was objected on behalf of the defendant:

1. That "The Ship on Fire," being merely a song, *was not a "musical composition" within the protecting clause (sect. 20) of stat. 5 & 6 Vict. c. 45. [*221]

2. That Crosby Hall was not a "place" "of dramatic entertainment" within the meaning of stat. 3 & 4 Will. IV. c. 15, s. 1, referred to by stat. 5 & 6 Vict. c. 45, s. 20.

3. That, assuming "The Ship on Fire" to be a "musical composition" within the statutes, the plaintiff ought to have proved (which he did not) that the work was registered, agreeably to stat. 5 & 6 Vict. c. 45, s. 13 (1).

(1) Stat. 3 & 4 Will. IV. c. 15, s. 1, recites the Copyright Act, 54 Geo. III. c. 156, and declares it expedient to extend the provisions of the said Act. It therefore enacts: "That from and after the passing of this Act the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed, and not printed and published by the author thereof or his assignee, or which hereafter shall be composed, and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey, and Guernsey, or in any part of the British dominions, any such production as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof; and that the author of any such production, printed and published within ten years before the passing of this Act by the author thereof or his assignee, or which shall hereafter be so printed and published, or the assignee of such author, shall, from the time of passing this Act, or from the time of such publication respectively, until the end of twenty-eight years from the day of such first publication of the same, and also, if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing, or causing to be represented, the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof: Provided nevertheless, that nothing in this Act contained shall prejudice, alter, or affect the right or authority of any person to represent or cause to be represented, at any place or places of dramatic entertainment whatsoever, any such production as aforesaid, in all cases in which the author thereof or his assignee shall, previously to the passing of this Act, have given his consent to or authorized such representation, *but that such sole liberty of the author or his assignee shall be subject to such right or authority." [*222, n.]

Sect. 2 enacts: "That if any person shall, during the continuance of such sole liberty as aforesaid, contrary to the intent of this Act, or right of the author or his assignee, represent or cause to be represented, without the consent in writing of the author or other proprietor first had and obtained, at any place of dramatic entertainment

RUSSELL v. SMITH. [222] [*223]

The learned Judge over-ruled these objections, reserving leave to move to enter a verdict for the defendant, or a nonsuit: and a verdict was given for the *plaintiff. *Watson*, in Trinity Term,

within the limits aforesaid, any such production as aforesaid, or any part thereof, every such offender shall be liable for each and every such representation to the payment of an amount not less than 40*s.*, or to the full amount of the benefit or advantage arising from such representation, or the injury or loss sustained by the plaintiff therefrom, whichever shall be the greater damages, to the author" &c., "to be recovered," &c., "in any Court having [*225, *n.*] jurisdiction in such cases in that part of the said United Kingdom or of the British dominions in which the offence shall be committed;" and where the sole liberty of such author &c. shall be subject to such right or authority as mentioned in sect. 1, it shall be sufficient for the plaintiff to state that he has such sole liberty, without stating the same to be subject to such right or authority, &c.

Stat. 5 & 6 Vict. c. 45, extends (sect. 3) the duration of copyright in books, and makes other regulations on the subject of such right. Sect. 11 provides for the keeping, at Stationers' Hall, of a book, wherein may be registered, as after enacted, "the proprietorship in the copyright of books, and assignments thereof, and in dramatic and musical pieces, whether in manuscript or otherwise, and licenses affecting such copyright."

Sect. 13 enacts: "That after the passing of this Act it shall be lawful for the proprietor of copyright in any book heretofore published, or in any book hereafter to be published, to make entry in the registry book of the Stationers' Company of the title of such book, the time of the first publication thereof, the name and place of abode of the publisher thereof, and the name and place of abode of the proprietor of the copyright of the said book, or of any portion of such copyright," in the form given by a Schedule (No. 3) to the Act, on payment of 5*s.* &c.: and that such proprietor may assign his interest by entry in the said book of registry.

Sect. 20 is as follows. "And whereas an Act was passed in the third year of the reign of his late Majesty, to amend the law relating to dramatic literary property, and it is expedient to extend the term of the sole liberty of representing dramatic pieces given by that Act to the full time by this Act provided for the continuance of copyright: and whereas *it is expedient to extend to musical compositions the benefits of that Act, and also of this Act; be it therefore enacted, That the provisions of the said Act of his late Majesty, and of this Act, shall apply to musical compositions, and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof, and his assigns, for the term in this Act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this Act, to the first publication of any book: Provided always, that in case of any dramatic piece or musical composition in manuscript, it shall be sufficient for the person having the sole liberty of representing or performing, or causing" &c. "to register only the title thereof, the name and place of abode of the author or composer thereof, the name and place of abode of the proprietor thereof, and

1847, moved for a rule to show cause why there should not be a nonsuit, verdict for defendant, or new trial. He also moved in *arrest of judgment, on the ground that the plaintiff, in his declaration, claimed "the sole liberty of representing and performing" &c., not qualifying the alleged right by the words used in stat. 3 & 4 Will. IV. c. 15, s. 1, "at any place or places of dramatic entertainment" "in any part of the United Kingdom" &c., "or in any part of the British dominions." A rule *nisi* was granted. In last Hilary vacation and Easter Term (1),

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Talfourd, Serjt., *Locke* and *Wise* showed cause:

As to the first objection. Assuming the plaintiff's exhibition to be nothing more than a song, it is protected, as a "musical composition," by stat. 5 & 6 Vict. c. 45. Under the former Act, 3 & 4 Will. IV. c. 15, the sole liberty of representing was given (sect. 1) to the author of any "tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment." Stat. 5 & 6 Vict. c. 45, s. 20, recites that "it is expedient to extend to musical compositions the benefits" of this and the former Act, and directs that the provisions of both Acts shall apply to "musical compositions," and that the sole liberty of representing &c. "any dramatic piece or musical composition" shall be the property of the author. By the interpretation clause, sect. 2, the words "dramatic piece"

the time and place of its first representation or performance."

Sect. 21 enacts: "That the person who shall at any time have the sole liberty of representing such dramatic piece or musical composition shall have and enjoy the remedies given and provided in the said Act of" &c. (3 & 4 Will. IV. c. 15), "during the whole of his interest therein, as fully as if the same were re-enacted in this Act."

Sect. 24 enacts: "That no proprietor of copyright in any book which shall be first published after the passing of this Act shall maintain any action or suit" for infringement of the copyright, unless he shall first "have caused an entry to be made, in the book of registry of the Stationers' Company, of such book, pursuant to this Act:" Provided that the omission to register "shall not affect the copyright in any book, but only the right to sue:" "Provided also, that nothing herein contained shall prejudice the remedies which the proprietor of the sole liberty of representing any dramatic piece shall have by virtue of the Act" 3 & 4 Will. IV. c. 15, "or of this Act, although no entry shall be made in the book of registry aforesaid."

Sect. 2, an interpretation clause, enacts that "the word 'book' shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or *plan separately published; and that the words 'dramatic piece' shall be construed to mean and include every tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic entertainment."

[*224,*n.*]

(1) February 12th and April 15th, 1848; before Lord Denman, Ch. J., Patteson and Erle, JJ. Wightman, J. was present during part of the argument on the latter day.

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include "tragedy, comedy, play, opera, farce, or other scenic, musical, or dramatic *entertainment." The framers of the Act, [*225] when adding, to a term comprehending all these subjects, the words "musical composition," must have intended something not within the former enumeration. If the words "musical composition" exclude musical pieces which are not "dramatic" within the meaning of the interpretation clause, the benefits of the two Acts are not extended according to the recital of sect. 20. A song is a musical composition in the strict sense of the term; and the context of the Act requires that that construction should be adhered to. But, further, the piece in question is dramatic. It depicts passing incidents by their effect on the feelings and conduct of persons who are represented speaking. That the whole is expressed in music makes no difference; the early Greek drama was musical throughout; so is the modern Italian Opera. Nor can any distinction arise from the want of scenery or appropriate dress: an oratorio has neither; yet it is often dramatic. Nor, again, is it material that no second person performs. No one would have suggested that Mr. Mathews's representations, or the readings of Shakspeare by Mrs. Siddons or Mr. Charles Kemble, were not dramatic. If the character of drama were denied to this entertainment, the objection could not stop short of requiring all the ingredients of a play.

Secondly, Crosby Hall was a "place of dramatic entertainment" within the meaning of stat. 3 & 4 Will. IV. c. 15, sects. 1, 2. It became so for the time, if a dramatic entertainment was performed there publicly and for money. The latter circumstance is pointed at by sect. 2, which enables the aggrieved party at his option to recover what is earned by the representation. The words of the [*226] *Act are quite general; "any place" &c. If the Legislature had contemplated such a restriction as the defendant relies upon, they would probably have used the words "any theatre, or place licensed for the performance of stage plays;" or some such language as that of stat. 25 Geo. II. c. 36, s. 2, or 6 & 7 Vict. c. 68, s. 2. "Dramatic," as one of the words describing the uses of the place, must be construed as the same term is in sect. 2 of stat. 5 & 6 Vict. c. 45. It was clear from the evidence at the trial that Crosby Hall was in truth a place of dramatic entertainment. The question was a mixed one of law and fact, and was for the jury, under direction from the learned Judge; and they have found for the plaintiff.

(ERLE, J.: I stated to them that, in my view, it was such a

place; but I told them that they might say whether in their opinion it was so or not.)

In *Russell* v. *Briant* (1) (an action for causing the piece now in question to be performed) WILDE, Ch. J. directed the jury in a similar manner, as to a representation at "The Horns" tavern at Kennington. TINDAL, Ch. J. said, in *Planché* v. *Braham* (2), that the question whether a particular performance "is or is not a representation of part of a dramatic production" must be left to the jury as matter of fact. In moving for the present rule, reference was made to Johnson's definition of "drama" in his Dictionary: a poem accommodated to action; a poem in which the action is not related, but represented." But the language of the statutes now in question requires the performance to be not "drama" but "dramatic." Lord Bacon ("Advancement of Learning," book ii. Poesy) divides Poesy into "narrative, representative and allusive;" and considers representative poetry to be "an image of actions as if they were present." The exhibitions now in question are of that kind; and so are all dramatic representations. Some portions, at least, of "The Ship on Fire" are dramatic, as was shown in the first part of this argument. Whether or not the place be properly licensed for the purpose of dramatic representations can make no difference to the plaintiff's right to recover, if his work has in fact been made use of in such a place. But, further, stat. 5 & 6 Vict. c. 45, s. 20, gives the sole privilege of representing or performing, "or permitting to be represented or performed, any dramatic piece or musical composition," without any reference to the place of performance. In *Russell* v. *Smith* (3), a case between the present parties, on motion to dissolve an injunction relating to the song now before the Court, Sir L. SHADWELL, V.-C. noticed the omission, in the late Act, of the words "at any place or places of dramatic entertainment," which occur in stat. 3 & 4 Will. IV. c. 15, s. 1, and observed that "the authors of musical compositions were" therefore "more extensively protected than the authors of dramatic pieces were" (4). Before stat. 3 & 4 Will. IV. c. 15, the author of a play was protected against the printing, but not against the representation of it,

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(1) Guildhall sittings after Michaelmas Term, 1847. The case came before the Court of Common Pleas on motion for a new trial, and was decided in Michaelmas Term, 1849.

(2) 44 R. R. 642 (4 Bing. N. C. 17).

(3) 15 Sim. 181.

(4) See per BRETT, M. R., in *Wall* v. *Taylor* (1883) 11 Q. B. D. at p. 108, 52 L. J. Q. B. at p. 563.—A. C.

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[*228] by wrongdoers: *Coleman* v. *Wathen* (1): that Act (sect. 2) prohibited the representation "at any place of dramatic entertainment within the limits" mentioned in sect. 1, but did not protect *musical compositions: then, by stat. 5 & 6 Vict. c. 45, the privilege was extended to musical compositions, and the limit as to place omitted. Sect. 21 of this Act incorporates the remedies given by the preceding statute, but without reference to the qualification in respect of place.

As to the third objection, the subject of registration is the copyright, not the exclusive right of representation: and stat. 5 & 6 Vict. c. 45, s. 24, expressly saves to the proprietor "the sole liberty of representing any dramatic piece," enjoyed by virtue of stat. 3 & 4 Will. IV. c. 15, "or of this Act," although no entry be made in the register. The earlier part of the same section, making registration necessary to the commencing of any action or suit, relates only to copyright in books. The International Copyright Act, 7 & 8 Vict. c. 12, s. 6, debars authors of musical compositions, as well as of books and dramatic pieces, from the benefits of that Act generally, in default of registration; but that is done by express words.

Lastly, there is no ground for arresting judgment. The plaintiff states his privilege as it is stated in that clause (sect. 20) of stat. 5 & 6 Vict. c. 45, under which he claims. He was not bound to introduce any qualifying words. * * *

[229] *Watson* and *Joseph Brown*, *contrà*:

The VICE-CHANCELLOR, in *Russell* v. *Smith* (2), gave no final judgment, but continued the injunction, leaving the plaintiff to bring his action. Then, as to the first two points now before the Court. Before stat. 3 & 4 Will. IV. c. 15, the author of a dramatic piece had a privilege as to the publication of copies, but could not recover against any one performing the piece without authority. That Act vested in the author the sole liberty of causing it to be represented "at any place or places of dramatic entertainment" in the United Kingdom &c., and imposed penalties on any other person causing such piece to be represented "at any place of dramatic entertainment within the limits aforesaid." But it seems by *Planché* v. *Braham* (3) to have been at least questionable whether, in the case of a musical composition, that statute fixed any direct liability on a person pirating the composer's words for the purpose of public

(1) 5 T. R. 245.
(2) 15 Sim. 181.
(3) 44 R. R. 642 (4 Bing. N. C. 17).

representation, if his music also were not used. This appears to have been a reason for introducing sect. 20 of stat. 5 & 6 Vict. c. 45, which effects *two objects: annexing both to dramatic pieces and [*230] to musical compositions the privilege of copyright as extended in point of duration by that Act, and applying to both the earlier provisions of the statute with respect to copyright and to the duty of registration. Sect. 21 gives to the possessor of each kind of property the remedies provided by stat. 3 & 4 Will. IV. c. 15, as fully as if they were re-enacted. It is clear, on comparison of the enactments, and on reference to their history, that the Legislature did not contemplate musical compositions in the widest sense, but those only which were of a dramatic character, and performed at such places of dramatic entertainment as are mentioned in the preceding statute. The Act of Victoria merely brings musical compositions within the operation of stat. 3 & 4 Will. IV. c. 15, for the purpose of protection; and the provisions of that Act cannot attach unless the "composition" mentioned in the later Act has the same dramatic character as the "piece" or "entertainment" spoken of in the earlier. It must be such a work as is exhibited at a "place of dramatic entertainment." According to the argument for the plaintiff, no kind of music would be beyond the purview of stat. 5 & 6 Vict. c. 45, even if it were a song played and sung at a private house (1). But, undoubtedly, the intention is merely to prevent one man from trafficking in another's work by exhibiting it in public for profit. It is argued on the other side that the words "musical or dramatic entertainment," in the interpretation clause (sect. 2) of stat. 5 & 6 Vict. c. 45, exhaust every kind of musical performance, so as to leave no distinct meaning to the words "musical composition" in sect. 20, unless they signify a bare song. But the words "musical entertainment" are often and properly used in announcing dramatic works of which music is an [*231] adjunct, but which have a character independent of it, as *The Beggar's Opera*, and *The Duenna*.

ERLE, J.: Why should the Legislature have intended to protect these rather than oratorios and other strictly musical works?)

Perhaps because their success depends more on theatrical exhibition with which unauthorized exhibitions would interfere), and not so much on publication of the music. The terms "dramatic piece"

(1) See *Duck* v. *Bates* (1884) 13 Q. B. Div. 843, 53 L. J. Q. B. 338.—A. C.

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and "musical composition" continually occur together in the Act of Victoria: and, by sect. 20, the fact equivalent to first publication (for the purpose of dating the commencement of privilege) is "the first public representation or performance" of the musical composition as well as of the dramatic piece. Then it is argued that, if the musical work must, by the statute, be dramatic, this production is so in its own nature, and that Crosby Hall, where it is performed, is, for the time at least, a place of dramatic entertainment. But, as to the character of the song, it is not dramatic merely because it expresses feelings appropriate to the several subjects touched upon. All songs are intended to do so: but the characteristic feature of drama (as the name imports) is action, not related but represented. Johnson, in his Dictionary ("Drama"), lays this down; and Lord Jeffrey, in one of his "Essays" (1), observes that "a drama is not merely a dialogue, but an action." A reading of Shakspeare, or of a novel, may move various passions; but it is not therefore a dramatic performance. The mere setting up of a stage cannot give that character, where there is neither scenery, appropriate dress,

[*232] *nor other actor than a person sitting at a piano. The song in question is more narrative than dialogue. As to the place, it appeared in evidence that Crosby Hall was, properly, a kind of lecture room. If, however, it is a place of public, it is not a place of dramatic, entertainment.

(PATTESON, J.: The plaintiff contends that the place is so, if the performance is dramatic. He would say that the street where *Punch* is performed is, for the time, a place of dramatic entertainment.)

Even that argument fails here, if it has been rightly contended on the defendant's part that the performance is not dramatic in itself. Places of musical entertainment are subject to a statute law (25 Geo. II. c. 36), quite distinct in its nature and details from that contained in stats. 10 Geo. II. c. 28, 28 Geo. III. c. 30, and other more recent Acts, which regulate places appropriated to the drama. Under the Police Act, 2 & 3 Vict. c. 47, s. 46, the police may enter any house or room, used for stage plays or dramatic entertainments and not being a licensed theatre, into which admission is obtained for money, and take into custody the persons found there without lawful excuse. No such power could be exercised over a concert

(1) Review of Lord Byron's "Sardanapalus." "Essays," vol. ii. p. 98.

room. The meaning of the term "entertainment of the stage," in stat. 10 Geo. II. c. 28, s. 2, was discussed, and a limited construction given to it, in *Rex* v. *Handy* (1), which explained *Gallini* v. *Laborie* (2).

The failure in proof of registration defeats the plaintiff's claim, if otherwise valid. The first clause of stat. 5 & 6 Vict. c. 45, s. 24, mentions only "copyright in any book;" but, by sect. 20, the provisions of this statute as to property in the copyright of books, *and [*233] as to registration, are extended to the "liberty of representing or performing" "any dramatic piece or musical composition." The saving proviso of sect. 24 applies to "any dramatic piece;" but this, and the term "musical composition," always appear as distinct in the prior sections, 20, 21, and 22 (3). By the interpretation clause, s. 2, "dramatic piece" is to be construed as including every "musical or dramatic entertainment:" but it has already been pointed out that these words do not apply to a mere musical performance; the entertainment must be of a like nature with those named just before, "tragedy, comedy, play, opera, farce."

Lastly, the unqualified assertion of right in the declaration is ground for arresting the judgment. * * *

Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (May 30th), delivered the judgment of the COURT: [234]

This action was brought for performing a musical composition, of which the plaintiff was the composer, at Crosby Hall. At the trial the Judge was taken to have directed, and the jury to have found, such matters as were requisite for maintaining the plaintiff's case, liberty being reserved to the defendant to move to reverse that decision. And the defendant has since contended before us: 1. That stat. 5 & 6 Vict. c. 45, by enacting that the provisions of stat. 3 & 4 Will. IV. c. 15, shall apply to musical compositions, extends only to the performance of musical compositions in places of dramatic entertainment; and that Crosby Hall was not such a place: and, 2. That the musical compositions to be protected were those composed for performance with dramatic pieces, the composition in question being not in that class.

It is not necessary for us to decide whether the statute is to be so restricted in respect of the compositions and places of performance

(1) 6 T. R. 286.

(2) 2 R. R. 581 (5 T. R. 242).

(3) Sect. 22 is a clause (not otherwise material) as to assignment of the copyright in a book containing a "dramatic piece or musical composition."

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comprised within it, because we are of opinion both that "The Ship on Fire" was a dramatic piece, and that Crosby Hall became, upon the occasion of this performance, a place of dramatic entertainment within the meaning of these statutes. It was proved that [*235] bills had been issued by the defendant, *announcing a vocal entertainment, with the price of tickets of admission, and giving a programme of the two parts of the performance. Of the six particulars in the first part, "The Dream of the Reveller" and "The Shipwreck" are named "descriptive scena," and "The Maniac" a "descriptive cantata." Of the five particulars in the second part, "The Gambler's Wife" and "The Ship on Fire" are named "descriptive scena." The hall was prepared with seats for the audience, and a stage for the performer; and the defendant, without scenes or appropriate dresses, accompanied his singing with a piano, and gave considerable expression to the matters described. The song in question is stated in the bill to be founded on the loss of the *Kent* by fire in the Bay of Biscay. It represents a storm at sea, the burning of the ship, and an escape by boat to another ship, and so a safe return to land. It moves terror and pity and sympathy, by presenting danger and despair and joy, and maternal and conjugal affection. A witness of great experience in publishing music deposed that this was considered a dramatic song, and published with the title of a dramatic and descriptive song; and there was no evidence that any one considered it not dramatic. Thus the nature of the production places it rather in the representative than the narrative class of poetry, according to Lord Bacon's division (1) of dramatic from epic; and the evidence states it to be known as dramatic among those who are conversant with such things.

If the interpretation clause of stat. 5 & 6 Vict. c. 45 be referred to, the second section declares that "dramatic piece," within that [*236] Act, includes "tragedy, comedy, *play, opera, farce, or" any "other scenic, musical, or dramatic entertainment." These words comprehend any piece which could be called dramatic in its widest sense; any piece which, on being presented by any performer to an audience, would produce the emotions which are the purpose of the regular drama, and which constitute the entertainment of the audience. They comprehend, therefore, the production in question, the nature of which in this respect was above pointed out. In holding this production to be a dramatic piece we give effect to the intention of the Legislature as we collect it from the series of

(1) "Advancement of Learning," book ii. Poesy.

statutes relating to literary property, namely, to give to authors the profits from the publication of their works. After the decision of *Murray* v. *Elliston* (1) it seems to have been considered that publication to an audience was not within the provision of the Acts relating to copyright; consequently stat. 3 & 4 Will. IV. c. 15, was passed, and, in respect to dramatic literary property, gave to authors the profits arising from publication by representing the piece on the stage. As there appears no reason for favouring one kind of literary property more than another, it is probable that this protection was intended for all productions adapted to this mode of publication. Now the use of the production in question, both by the plaintiff and the defendant, shows that it is so adapted, and is supposed to be profitable to those who so publish it. The absence of scenes and appropriate dresses and a regular theatre has been urged for the defendant. But we should take away a part of the protection conferred on authors if we held that there could be no public representation *without these accompaniments. Upon the whole, [*237] therefore, we are of opinion that "The Ship on Fire" was a dramatic piece within the meaning of this statute.

It follows that, as Crosby Hall was used for the public representation for profit of a dramatic piece, it became a place of dramatic entertainment for the time within the statutes now in question. The use for the time in question, and not for a former time, is the essential fact. As a regular theatre may be a lecture room, dining room, ball room and concert room on successive days, so a room used ordinarily for either of those purposes would become for the time being a theatre, if used for the representation of a regular stage play. In this sense, as "The Ship on Fire" was a dramatic piece in our view, Crosby Hall, when used for the public representation and performance of it for profit, became a place of dramatic entertainment.

In thus deciding we do not declare that the defendant's performances at Crosby Hall were unlawful without a theatrical licence within stat. 6 & 7 Vict. c. 68: and, as to this, we would remark that the generic term in the statute is "stage play," whereas in stat. 5 & 6 Vict. c. 45, it is "dramatic piece;" and there is some difference in the interpretation given of these terms in the respective statutes: and also that the purview of the last statute is the maintenance of good order by the police, and that of the first is compensation to composers by securing literary property.

(1) 24 R. R. 519 (5 B. & Ald. 657).

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It was further contended that this action would not lie because the plaintiff's right was not registered; and stat. 5 & 6 Vict. c. 45, s. 24, was relied on, which enacts that no proprietor of the copyright in any book *shall sue for infringement unless he shall be registered; and provides that this shall not extend to the proprietor of the sole representing of a dramatic piece. The answer is: First, that the prohibition relates only to copyright of books, and does not comprise the sole liberty of performing a musical composition; Secondly, if it did, the proviso would except it; for the proviso excepts the sole liberty of representing dramatic pieces, and section 20 applies to musical compositions the provisions of stat. 3 & 4 Will. IV. c. 15, and of this Act; an exception, therefore, in favour of the sole representation of a dramatic piece is extended to the performance of a musical composition; Thirdly, the enactment in section 20 does not assist the defendant; for by that the provisions therein "before enacted," in respect of the property of copyright and registering the same, are applied to the representation of dramatic pieces and musical compositions: but this of course does not comprise the provisions therein after enacted, viz., by section 24.

The rule of the defendant is therefore discharged.

With respect to the motion in arrest of judgment on the ground that the plaintiff has claimed too large a right in his declaration, we are of opinion that, as he has followed the words of the 20th section of stat. 5 & 6 Vict. c. 45, which gives the right, the declaration is sufficient. Whatever the Act means by the words used in that section, the plaintiff means the same by his declaration; as was said by the COURT in delivering the judgment in the case of *Lee* v. *Simpson* (1).

Rule discharged.

1848.
May 11.
June 2.

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DOE D. GARDNER *v.* KENNARD (2).

(12 Q. B. 244—259; S. C. 12 Jur. 821.)

A lease of land by indenture contained this clause, following covenants to repair, pay rent, &c. "Provided nevertheless, that in case M." (the lessor) "shall at any time be desirous of having any part of the said piece of land delivered up to him, and of such his desire shall give three calendar months' notice to C." (the lessee), "then, at the expiration of such notice, he, the said C., doth hereby covenant peaceably to surrender up, and that the said M. shall and may take peaceable possession of, such part or parts of the said land as shall be mentioned in such notice; he the said M. paying

(1) 71 R. R. 524 (3 C. B. 883).

(2) Cited in *Liddy* v. *Kennedy* (1871) L. R. 5 H. L. 134, 141.—A. C.

to the said C. a reasonable compensation in respect of the moneys which may have been laid out by C. in improving the condition of so much of the said piece of land as shall be so given up: and then and from thenceforth the rent reserved by this indenture shall be reduced" &c. (in proportion to the land given up); "and the remainder of the said land shall be held by C. at such reduced rent, and M. shall have the same powers and remedies in all respects as if this lease had originally been granted at such reduced rent: and all the covenants, clauses, &c., herein contained, shall be as valid for so much of the demised land as shall not be included in such notice as if the reduced rent had been the original rent, and the land originally demised had been the land not included in such notice."

Held that, under this proviso, the lessor, giving notice, might resume all the demised land.

That the proviso did not operate as a mere covenant by the lessee to give up on notice, but expressly gave the lessor power to take possession; and that he might do so without having first paid compensation.

The lessor served a notice requiring the lessee to give possession of the whole land at the end of three months, and adding: "I hereby offer and agree to allow you a reasonable compensation for any repairs which may have been done by you." Held a sufficient offer of compensation under the proviso.

The lessee brought ejectment, laying one demise, entry and ouster before, and another demise, entry and ouster after, the expiration of the three months. The defendant had entered during the three months. The declaration was dated after their expiration. Held that the plaintiff could not recover on the first demise.

EJECTMENT for land in the parish of Woolwich, Kent: Declaration of Hilary Term, 1848: demise, to wit 1st October, 1846, with entry and ouster, to wit on the same day; second demise, to wit 8th January, 1848, with entry and ouster, to wit on the last mentioned day. On the trial, before Lord Denman, Ch. J., *at the [*245] Maidstone Spring Assizes, 1848, the facts as to which the defendant's counsel, on the opening of the case, admitted that there was no dispute appeared to be as follows.

The lessor of the plaintiff had been tenant of the land for a term, and the defendant reversioner.

By indenture of lease, dated 25th December, 1836, between John Mills (the tenant in fee) of the one part, and Christopher Matthews of the other part, the said John Mills demised the land in question, containing twenty-two acres, two roods, and fourteen perches, to the said Christopher Matthews, *habendum* to him, his executors, administrators or assigns, for fifteen years from the day of the date, at the rent of a peppercorn for the first year, and 47*l.* 5*s.* for every subsequent year. There were covenants to pay the rent, to repair and yield up in repair the hedges, ditches, &c., and a proviso for re-entry if the rent should be unpaid for twenty-one days after any day of payment. There was likewise a proviso as follows.

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"Provided nevertheless, and it is hereby lastly declared and agreed by and between the said parties hereto, that, in case the said John Mills, his heirs and assigns, shall at any time, or from time to time during the continuance thereof, be minded and desirous of having any part of the said piece or parcel of land and premises hereby demised delivered up to him or them, and of such his or their mind and desire shall give three calendar months' notice or warning in writing to the said Christopher Matthews, his executors, administrators or assigns, or leave the same at his or their last or usual place of abode, or upon the said demised premises, such notice to expire at any period; then, at the expiration of such notice or
[*246] warning so *given or left as aforesaid, he the said C. M., for himself, his executors, administrators and assigns, doth hereby covenant peaceably and quietly to yield and surrender up, and that the said John Mills, his heirs and assigns, shall and may take peaceable and quiet possession of, such part or parts of the said land or premises as shall be mentioned and included in such notice as aforesaid; he the said John Mills, his heirs or assigns, paying to the said C. M., his executors, administrators or assigns, a reasonable and fair compensation in respect of the moneys which may have been laid out by the said C. M., his executors, administrators or assigns, in improving the condition of so much of the said piece or parcel of land as shall be so given up to the said John Mills, his heirs or assigns, as hereinbefore mentioned: and then and from thenceforth the rent reserved by this indenture shall be reduced at the rate of 2*l.* 2*s.* for each and every acre, and so in proportion for a less quantity than an acre, that may be given up to the said John Mills, his heirs and assigns, as aforesaid: and the remainder of the said land shall be held by the said C. M., his executors, administrators or assigns, at such reduced rent: and the said John Mills, his heirs and assigns, shall have the same powers and remedies in all respects as if this lease had originally been granted at such reduced rent, and all and every the covenants, clauses, provisions, stipulations and agreements herein contained shall be as valid and effectual of and for so much of the land hereby demised as shall not be included in any such notice, and this indenture shall be read and construed in all respects in reference thereto, as if such reduced rent had been the original rent reserved therein, and the land
[*247] originally demised had been the land not *included in any such notice as aforesaid, and the covenants, clauses, provisoes, stipulations and agreements herein contained had only related to such

last-mentioned land." The lease also contained other and usual covenants.

The plaintiff, in 1840, became assignee of Matthews's term in the land, which he used for grazing. In 1845, Mills conveyed his own interest to the defendant, John Peirse Kennard, subject to the lease. Kennard, in March, 1846, gave notice to the lessor of the plaintiff as follows.

"To Mr. John Gardener, of Mile End in the county of Middlesex, the executor appointed in and by the last will and testament of Christopher Matthews, late of" &c., "deceased, and to all others whom it may concern. Pursuant to, and by virtue of, a certain indenture of lease bearing date the 25th December, 1836, and made between John Mills, therein described, of the one part, and the said Christopher Matthews of the other part, I hereby give you notice that I am desirous of having delivered up to me, at the expiration of three calendar months from the service of this notice upon you, the peaceable and quiet possession of all that piece or parcel of land situate" &c., "and which said piece of land contains by admeasurement twenty-two acres, two roods, fourteen perches, or thereabouts, and is bounded by the sea wall towards the river Thames, and on all other sides by a ditch which separates the same from other marsh land now belonging to me; together with all the appurtenances thereunto belonging. And I require you to deliver up possession of the same to me accordingly, and to surrender all your interest in the same to me, at the expiration of the said three calendar months: and in consideration thereof I *hereby offer and agree to allow you a reasonable compensation for [*248] any repairs which may have been done by you, and to release you from all liability to the payment of rent under the said indenture of lease from the time of my taking possession of the whole of the said marsh land. And I hereby further give you notice that the fee simple of the said piece or parcel of marsh land was conveyed to me by John Mills, Esquire, by indenture bearing date the 19th day of June, 1845, and that I am now the absolute owner of the same. Dated this 24th day of March, 1846.

"JOHN P. KENNARD."

The notice was served on 6th August, 1846. The lessor of the plaintiff was not, and had not been, executor of Matthews.

It was stated by counsel in opening the case that the land was wanted for the purposes of a Railway Company; that they had

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wrongfully entered upon the premises and commenced works upon them before the notice was given; and that they continued in the possession obtained by such entry at the dates of both demises. On this part of the case it appeared, upon the argument in Banc, that counsel were not agreed as to the facts: but the motion was ultimately dealt with on the assumption only that the reversioner appeared to have taken possession at some time before three months from the service of notice had expired.

The LORD CHIEF JUSTICE, with the concurrence of counsel on both sides, directed a verdict for the plaintiff, reserving leave to move to enter a nonsuit or a verdict for the defendant, if the Court should decide in his favour on certain points, which will appear by the ensuing argument.

[249] *Shee*, Serjt., in Easter Term, 1848, obtained a rule *nisi* accordingly (1).

In the same Term (2),

Hawkins and *Parnell* showed cause:

First, under the proviso for resumption the landlord could not give notice to quit all the land: and, if the notice is bad in this respect, it is wholly unavailing, as no specific portion is claimed. The stipulation is that the tenant shall from time to time give up such parts of the land as shall be demanded: the nature of such a clause, and the arrangement for apportioning the rent, and other circumstances manifesting the intention of the parties, show that an entire resumption was not contemplated. It may be said that this argument is inconclusive because, consistently with the view taken of the proviso by the lessor of the plaintiff, all the land except half an inch might have been resumed. But a court of equity would construe the proviso according to the clear intention, and would not permit so much land to be taken away as would leave the residue useless for the purpose of grazing. If the proviso were held to give such a power, it would be a reservation of right, as was said by this Court in *Hilton* v. *Earl Granville* (3), "destructive of the subject-matter of the grant," and therefore to "be rejected as repugnant and absurd."

(LORD DENMAN, Ch. J.: The power here is to be exercised only on

(1) The COURT ordered that the case should not be set down in the new trial paper.

(2) May 11th. Before Lord Denman, Ch. J., Patteson and Wightman, JJ.

(3) 64 R. R. 604 (5 Q. B. 701, 730).

three months' notice. Might not parties make an express stipulation to that effect ?)

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In *Cooke* v. *Farrand* (1), *which was cited in moving for this rule, a testator devised real estates to his widow for her life, reserving to her "full power to will away any part or proportion" of them; and, after her decease, the "residue and remainder of what was undisposed of by his wife" to his daughter and the heirs of her body. The Court of Common Pleas held that the wife might devise away the whole. But that was the case of a will conferring power to create a new estate, and prevent a different one from vesting: here the property is vested by lease, and the question is on devesting the estate wholly or in part. The provision for apportioning the rent strongly distinguishes that case from the present. A doctrine applicable to this case is laid down in 1 Sugden on Powers, 517 (7th ed.) ch. 7, s. 3, § 16. "A power to grant a rent-charge on any part of the estate of a particular value will not, even in equity, authorise a charge of the rent on the entire estate, because in such cases the intent is that the whole estate shall not be encumbered; so a power to settle part of the land of a given value, will not authorise a grant of a rent charge of the same value on the whole estate, but equity, where there is a proper consideration, will of course relieve against the defective execution."

[*250]

(PATTESON, J. mentioned *Doe* d. *Wilson* v. *Abel* (2).)

That case is something like this, but is no authority for the defendant. There it was held that the lessor might resume all the land; but the lease expressly gave power to take "all or any part." By the last clause of the proviso in the present case, after such resumption as is there spoken of, the residue of the land is to be held by *the lessee at a reduced rent; and all the covenants &c. contained in the lease are to be as valid and effectual, for so much of the demised land as shall not be included in such notice, as if the reduced rent had been the original rent, and the land originally demised had been the land not so included, and the covenants &c. had related to such last-mentioned land only. If the lessor takes all, this provision is nugatory; for there is no land to which the covenants can relate.

[*251]

Secondly, the clause in question is not a condition operating in defeasance of the estate, but amounts merely to a covenant on the

(1) 7 Taunt. 122.

(2) 15 R. R. 343 (2 M. & S. 541).

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lessee's part to give up possession on receiving certain notice: failing to yield it, he was liable to an action for the breach, but not liable to be expelled. The clause must be construed strictly; and the operative part is in form nothing but a covenant. *Doe* d. *Willson* v. *Phillips* (1) is an authority on this point. BURROUGH, J. said there: "This is clearly an agreement only, and not a condition, because there are things to be done on both sides; Rippon" (the tenant) "is to give up on request, and Willson" (the landlord) "is to make an abatement of rent, according to a valuation."

Thirdly, whether the proviso raises a condition or a covenant, it was a condition precedent to the taking possession that the lessor should have paid, or shown himself ready to pay, a reasonable and fair compensation: and the defendant has not attempted to show that this was done. By his notice he offers and agrees to allow compensation, but does not declare himself ready and willing to pay it. And the compensation is offered "for any repairs," not, according to the proviso, for *"moneys which may have been laid out" "in improving the condition" of the land. [They referred to *Lister* v. *Lobley* (2), *Dawson* v. *Dyer* (3), *Thomas* v. *Cadwallader* (4), and other cases cited in note (3) to *Peeters* v. *Opie* (5), the fifth rule in note (4) to *Pordage* v. *Cole* (6), *Porter* v. *Shephard* (7), and *Morton* v. *Lamb* (8).]

[*252]

[*253]

Fourthly: the defendant, even if otherwise entitled, *cannot avail himself of an entry which was made wrongfully and without notice. (On this point there was a dispute as to the fact: see p. 280, *ante*. *Doe* d. *Stephens* v. *Lord* (9) and *Doe* d. *Bullen* v. *Mills* (10) were cited.)

The last point, which relates to the first demise only, is that, at all events, on the day there laid, October 1st, 1846, the lessor of the plaintiff had a right to the land still; for the three months from service of notice were running, and did not expire till November 6th. That his title for the intermediate time will support an action of ejectment appears from *Doe* d. *Morgan* v. *Bluck* (11), and Co. Litt. 285 a.

Shee, Serjt. and *Willes*, *contrà*:

The first point depends wholly on the wording of the proviso agreed upon by these parties: and clearly a power to resume the

(1) 27 R. R. 539 (2 Bing. 13).
(2) 7 Ad. & El. 124.
(3) 39 R. R. 566 (5 B. & Ad. 584).
(4) Willes, 496.
(5) 2 Wms. Saund. 352 d, e (6th ed.).
(6) 1 Wms. Saund. 320 e.
(7) 3 R. R. 305 (6 T. R. 665).
(8) 4 R. R. 395 (7 T. R. 125).
(9) 7 Ad. & El. 610.
(10) 41 R. R. 364 (2 Ad. & El. 17).
(11) 14 R. R. 804 (3 Camp. 447).

whole land was contemplated. On the most literal construction, it might have been taken piece by piece at short intervals of time: there is no substantial reason, therefore, why the whole should not be taken at once. *Cooke* v. *Farrand* (1), though not exactly in point, shows that a power of this kind must take effect unless some clear restriction appear by the instrument on which it depends: and that the use of such words as "any part," instead of "the whole or any part," does not imply a restriction.

(LORD DENMAN, Ch. J.: On the mere construction of the words, the point is too clear for argument. The right to take every part results from the reservation of right to take any part. The question must turn upon the sense of the whole stipulation.)

Secondly, the reservation of power to resume operates as a condition. The use of the word "covenant" does not prevent this: Com. Dig. Condition (A 2). In *Doe* d. *Willson* v. *Phillips* (2) the agreement contained a clause of the same nature as this; and the Court of Common Pleas held that a covenant only was created: but BEST, Ch. J. said: "I am inclined to consider the stipulation a covenant, rather than a condition," "because the lessor, if he had intended it to be a condition, might have inserted an express clause of re-entry." A clause having that effect is introduced here. He observed: "The agreement contains an absolute demise for twenty-one years, and this can only be defeated by terms as strong and express as those by which it is created; but what are the terms here?" "There is not a single syllable in the agreement to create a condition, because a condition defeats that which has been before granted, and there are no words here to vest in the lessor of the plaintiff a right of entry." And he cited 4 Cruise's Dig. 353 (4th ed.), tit. 32, c. 25, s. 3, where Littleton, B. 3, c. 5, s. 331, is referred to. In the present lease the stipulation that the tenant shall surrender and the lessor take possession is equivalent to a power of re-entry: the case, therefore, is an authority for the defendant. [254]

Thirdly: The intention of the proviso clearly was that the landlord should be able to resume possession in three months after notice. But that would be defeated if the notice could not operate till the landlord had tendered the requisite sum for compensation. The value of the improvements did not lie within his knowledge; *the evidence was in the tenant's hands; and the interval between [*255]

(1) 7 Taunt. 122.

(2) 27 R. R. 539 (2 Bing. 13).

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notice and possession might be protracted at his pleasure, if the right of entry depended on his furnishing the accounts. But in fact no evidence of improvement was opened at the trial. If the landlord was not bound to pay or tender compensation before taking the land, it will scarcely be contended that, in point of form, he was bound to state on the notice his readiness to pay what might be found due. * * *

[256] As to the last point: it may be that the lessor of the plaintiff had a right to continue on the premises till November 6th. But the question is, whether he had any right at the time of serving the declaration. Otherwise any person who ever had title to lands might, though entitled no longer, recover in ejectment by laying one demise at a time when the right still subsisted. The plaintiff in ejectment may in some cases recover damages, though not the term; but that is where the title of the lessor of the plaintiff has expired pending the action, not where he has commenced it after determination of the title. * * *

Cur. adv. vult.

[258] LORD DENMAN, Ch. J., in this Term (June 2nd), delivered the judgment of the COURT:

The first question in this case is, whether the defendant was entitled under the lease to require possession of the whole of the premises after three months' notice, or of part only. The proviso is, in substance: In case the lessor shall, at any time, or from time to time, during the continuance thereof, be minded to and desirous of having any part of the said piece or parcel of land and premises, hereby demised, delivered up to him, and give three months' notice in writing, the lessee covenants to give up, and that the lessor shall and may take, peaceable and quiet possession, paying a reasonable [*259] and fair compensation in respect of the *moneys which may have been laid out by the lessee in improving the condition of the land given up.

On the argument we expressed our opinion that the lessor was entitled, under this proviso, to require possession of the whole.

We further think that the proviso does not operate by way of covenant merely; for it expressly gives the lessor the power to take possession.

With respect to the paying compensation, we are of opinion that, although the notice of the lessor used the words in respect of "any repairs which may have been done by you," instead of "in respect

of moneys which may have been laid out by you in improvements," yet it sufficiently contained an offer to pay compensation within the meaning of the lease; and that it lay on the lessee to make his claim within the three months. Such notice ought not to be construed strictly, as an averment of readiness and willingness to pay might be construed in a declaration if an action had been brought on the covenant to yield up; and it seems impossible that the lessee could have been misled by it.

It was further said that the lessor had taken possession before the expiration of the three months. If he did so, such act on his part may have entitled the lessee to bring an action of trespass, or perhaps to sustain an action of ejectment forthwith, but cannot in our judgment entitle him to bring such action of ejectment long after the three months have expired, and his interest has been put an end to.

Under these circumstances we are of opinion that the rule to enter a verdict for the defendant must be made absolute.

Rule absolute.

HADDRICK *v.* HESLOP AND RAINE (1).

1847. *Nov.* 5.

(12 Q. B. 267—277; S. C. 17 L. J. Q. B. 313; 12 Jur. 600.)

[267]

Case for maliciously, and without probable cause, indicting plaintiff for perjury. Averment: that plaintiff was tried and acquitted, and judgment given that he should depart without day, as by the record appeared. Plea: Not guilty.

The evidence on which perjury was assigned was given against defendant in an action in which he was defendant, and in which the evidence for him contradicted that of the then plaintiff. Defendant, on being told of the now plaintiff's evidence, said he would indict him for perjury. Defendant's informant said he thought there was no ground for such indictment; but defendant replied that he should move for a new trial (in the then action), and the indictment would stop the mouths of the now plaintiff and the opposite party for a time. Held:

1. That the jury were properly asked whether the defendant believed there was reasonable and probable cause for the prosecution: and, they having found that he did not, that the Judge was right in ruling that there was no such cause.

2. That the jury were rightly told that, if, upon the above evidence, they believed that the defendant acted from an improper motive, they might infer malice.

3. That the acquittal was admitted on the record.

CASE for maliciously and without reasonable and probable cause indicting the plaintiff for perjury. Averment that the plaintiff was

(1) See *S. C.* in error sub nom. *Heslop* v. *Chapman* (1853) 23 L. J. Q. B. 49, 18 Jur. 348, 2 C. L. R. 139 (cited *Johnson* v. *Emerson* (1871) L. R. 6 Ex. 329, 351, 40 L. J. Ex. 201).—A. C.

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tried and acquitted, and judgment given that he should depart without day, as by the record appeared, &c.

Plea, by Heslop: Not guilty. Issue thereon.

[268] Raine suffered judgment by default.

A *venire* was awarded to try the issue as to Heslop, and assess damages as to Raine.

On the trial, before Wightman, J., at the Durham Summer Assizes, 1847, it appeared that the evidence on which perjury was assigned, in the prosecution mentioned in the present declaration, was given on the trial (July, 1845) of a cause in which one *Hinde* was plaintiff, and *Raine* and *Heslop* were defendants, and Hinde sued the defendants for the price of certain barley. The pleas were: 1. *Nunquam indebitatus*, on which nothing material to the present question arose; 2. That Hinde had sold the barley by means of a fraudulent representation as to its quality. Contradictory evidence was given for the plaintiff and defendants respectively on this last point; the present plaintiff Haddrick was a witness for the plaintiff Hinde; and the perjury was assigned upon his evidence on this point. CRESSWELL, J., who tried that cause, left the question to the jury on the conflicting evidence, stating that there was gross perjury on one side or the other. The jury found for the plaintiff Hinde on both issues. The defendants thereupon indicted the now plaintiff, Haddrick, for perjury; and the present action was for that indictment.

Raine, who had suffered judgment by default, was called for the plaintiff, and his evidence, after argument, was admitted. No evidence was given of the acquittal alleged in this declaration: but the learned Judge held, on the objection being taken, that the pleadings admitted it. It was shown, on the part of the

[*269] plaintiff, that the now defendant Heslop received the *account of Haddrick's evidence from another party, and then stated that he would indict Haddrick for perjury; and that his informant thereupon expressed an opinion that there was no ground for such indictment; on which Heslop said that, even if there were not sufficient grounds for the indictment, it would tie up the mouths of Hinde and Haddrick for a time, and that he would move for a new trial. No witnesses were called for the defence. The learned Judge asked the jury whether Heslop believed that there was reasonable ground for indicting, and whether he had indicted from malice. The jury answered that Heslop did not so believe; and, as to the malice, they said that they thought that the word "malice"

was strong, but that they thought the defendant had indicted from an improper motive. The learned Judge then decided that the indictment was without reasonable or probable cause, and told the jury that they might infer malice from the improper motive. Verdict for the plaintiff.

In Michaelmas Term (November 5th), 1847,

Bliss moved for a new trial, on the grounds of misdirection and of the improper admission of evidence, and upon affidavits:

First: the question of the defendant's belief ought not to have been left to the jury. It is for the Judge to decide whether there was reasonable and probable cause. It is true that he may, in order to decide this, obtain the opinion of the jury upon facts which, when found, he himself is to act upon in deciding as to the reasonableness and probability. But belief is not such a fact: it is material as to the malice, but there may *well exist reasonable and [*270] probable cause constituted by facts from which the defendant has wrongly drawn an inference of want of cause. It is otherwise where the belief becomes material as an ingredient in the question of *mala fides*: that was the case in *Ravenga* v. *Mackintosh* (1), where the defendant rested his defence upon the ground that he had acted *bonâ fide* on a legal opinion, and the jury found that he had not so acted. Nothing should be left to the jury but "the truth of the facts proved, and the justice of the inferences to be drawn from such facts;" and it is only as affecting those questions that the belief of the party is material: *Panton* v. *Williams* (2).

(WIGHTMAN, J.: Suppose I had left to the jury whether they believed the witnesses for the plaintiff or those for the defendant, and they had answered that they believed the former and not the latter: should I not then have been bound to tell them that there was no probable cause?)

Yes, if the question had been as to the truth of the alleged facts: but that was not so here; no witnesses were called for the defendant; and the question left was, not whether the facts supposed to inculpate the plaintiff were true, but whether the defendant believed them to be so. Here, as there were witnesses on both sides on the original trial, and perjury was undoubtedly committed on one side

(1) 26 R. R. 521 (2 B. & C. 693). (2) 57 R. R. 631 (2 Q. B. 169, 194).

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or the other, there was probable cause for indicting, whatever opinion the present defendant formed. In *Davis* v. *Hardy* (1), it was held that, where a witness was not impeached, a Judge might act upon his testimony, and direct the jury that there was reasonable and probable cause, without leaving the fact *to them. In *Musgrove* v. *Newell* (2), the Court of Exchequer appear to have been of opinion that, where reasonable and probable cause once existed, subsequent facts tending to remove the defendant's belief in such cause did not negative the probable cause, though they might be important as to the question of malice.

[*271]

(LORD DENMAN, Ch. J.: I never could understand why the Court of Exchequer thought my ruling in that case wrong.)

[272] * * The strongest case in favour of the learned Judge's direction appears to be *Broad* v. *Ham* (3); but there the absence of belief on the part of the defendant was considered to furnish some evidence that the facts themselves were not enough to suggest the probability to the mind of a reasonable man. That is different from treating the absence of belief as a direct negative of the probability arising from undisputed facts. *Turner* v. *Ambler* (4) must be explained in the same way. The intrinsic probability is one thing; the belief, as resulting from the constitution of a particular mind, is another.

(LORD DENMAN, Ch. J.: Suppose the disbelief to arise from knowledge of the facts.)

It then becomes material as evidence of the facts, as was laid down in *Panton* v. *Williams* (5).

Next: the jury were misdirected as to malice. The mere fact that the defendant had an indirect motive, however improper, in instituting the prosecution does not show malice. The malice required in this action is express malice in fact, not mere malice in law. In the judgment of Lords MANSFIELD and LOUGHBOROUGH, in *Johnstone* v. *Sutton* (6), it is said (7): "From the want of probable

(1) 30 R. R. 306 (6 B. & C. 225).
(2) 46 R. R. 503 (1 M. & W. 582; *S. C.* Tyr. & G. 957).
(3) 50 R. R. 843 (5 Bing. N. C. 722).
(4) 74 R. R. 278, 283 (10 Q. B. 252, 259).
(5) 57 R. R. 631 (2 Q. B. 194).
(6) In Ex. Ch. 1 R. R. 269 (1 T. R. 510), reversing the judgment of the Court of Exchequer in *Sutton* v. *Johnstone*, 1 R. R. 257 (1 T. R. 493). Judgment of Ex. Ch. affirmed on error, in Dom. Proc., 1 R. R. 297 (1 T. R. 784); *S. C.* 1 Br. P. C. 76 (2nd ed.).
(7) 1 T. R. 545.

cause, malice may be, and most commonly is, implied. The knowledge of the defendant is also implied." The jury ought therefore to have been told *that the indirect motive was quite consistent with absence of malice, unless the defendant knew (not simply believed) that there was no probable cause, or unless there were some evidence of express malice towards the plaintiff. [*273]

Next, the fact of the acquittal, which is alleged in the declaration, should have been proved. * * *

Next, the witness Raine was not competent. (On this point, *Bliss* referred to *Worrall* v. *Jones* (1) and *Pipe* v. *Steele* (2).) [274]

(He also discussed the affidavits.)

LORD DENMAN, Ch. J.:

It would be quite outrageous if, where a party is proved to believe that a charge is unfounded, it were to be held that he could have reasonable and probable cause. Reference has been made to *Turner* v. *Ambler* (3), where there was an allusion to a decision of my brother MAULE, upheld afterwards in the Common Pleas (4), to the effect that reasonable and probable cause cannot exist without belief. There may possibly be some difficulty in distinguishing the case last mentioned from some others: but I think that belief is essential to the existence of reasonable and probable cause: I do not mean abstract belief, but a belief upon which a party acts. Where there is no such belief, to hold that the party had reasonable and probable cause would be destructive of common sense. Proof of *the absence of belief is almost always involved in the proof of malice. In *Turner* v. *Ambler* (3) there was no point directly made at the trial as to want of belief: the only question was whether the facts of themselves bore out the probability and reasonableness. But, where a plaintiff takes upon himself to prove that, assuming the facts to be as the defendant contends, still the defendant did not believe them, we ought not to entertain any doubt that it is proper to leave the question of belief as a fact to the jury. It is not absolutely necessary that this belief should be the motive on which he acted: he may act from malice, and yet, if there was reasonable and probable cause in which he believed, the case against him must fail. As to the acquittal not being proved, the Court of [*275]

(1) 7 Bing. 395.
(2) 2 Q. B. 733.
(3) 10 Q. B. 252, 278.
(4) The case alluded to is perhaps *Broad* v. *Ham*, 50 R. R. 843 (5 Bing. N. C. 722). By the report of *S. C.* in 8 Scott, 40, the cause appears to have been tried before Maule, B.

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Exchequer has decided (1) that the plea of Not guilty does not put that in issue. On these points no rule will be granted. But a rule should be granted on the admission of the evidence, and on the affidavits: there may also be a question whether the jury were warranted in coming to the conclusion that the defendant did not believe that there was reasonable and probable cause.

COLERIDGE, J.:

I have little to add. It is clearly settled (and I do not regret it) that the question of reasonable and probable cause is for the Judge. I always understood this question to be, whether there was reasonable and probable cause for the particular prosecution; and, if so, there must be some preliminary facts in question: the Judge must say to the jury, "I tell you, if you think so and so, there is a want [*276] of reasonable and probable cause." Here it is sufficient that *the prosecutor did not believe in such cause, and instituted the prosecution from the corrupt motive of suppressing evidence. It was, therefore, right to ask the jury whether he did believe that there was probable cause for indicting, and whether he instituted the prosecution from such a motive. As to the malice, I think the Judge did enough. The jury said that malice, in its ordinary sense, was a grave charge; the Judge then properly told them that, if the defendant had acted from an improper motive, they might infer malice.

WIGHTMAN, J.:

As to the question of reasonable and probable cause, the whole case showed that Heslop was not personally cognizant of the facts which were in question on the original trial: he seems to have acted on the relation of others. The question is, whether he acted on what he thought probable. He is told that there is no ground for the indictment: instead of answering that he is satisfied that there is, he says the indictment will stop the mouths of his adversaries. Surely that is evidence on which a jury might come to the conclusion that there was, in his belief, no probable cause. It is said that the question, whether the supposed cause really actuated the defendant, goes only to the malice: but I should say that, if it goes to the malice, it goes *à fortiori* to the probable cause. As to the acquittal, I should have felt no doubt, even in the absence of an express decision, that it is not put in issue by the plea of Not guilty.

(1) *Watkins* v. *Lee*, 52 R. R. 721 (5 M. & W. 270).

ERLE, J.:

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I think the case was properly left to the jury. The defendant made the charge upon information *given to him: it was left to the jury whether he believed that information: and they found that he did not. It would be monstrous to say he had reasonable and probable cause. As to the acquittal, whenever an essential fact is introduced in the declaration, and not traversed in the plea, it is admitted.

[*277]

Rule refused as to misdirection (1).

Afterwards, in the same Term (November 18th), a rule *nisi* was granted on the other points (1).

GRACE HUMBLE *v.* HUNTER (2).

1848. *May* 29.

(12 Q. B. 310—317; S. C. 17 L. J. Q. B. 350; 12 Jur. 1021.)

[310]

In assumpsit on a charter-party executed, not by plaintiff, but by a third person who, in the contract, described himself as "owner" of the ship:

Held, that evidence was not admissible to show that such person contracted merely as the plaintiff's agent.

ASSUMPSIT, on a charter-party, for freight, demurrage &c. The declaration stated the instrument as "a certain charter-party of affreightment then made between the plaintiff, then and still being the owner of the good ship or vessel called *Ann*," and the defendant. Pleas: *Non assumpsit;* and others which it is unnecessary to state.

On the trial, before Wightman, J., at the Durham Summer Assizes, 1847, the charter-party was put in, signed, not by the plaintiff, but by her son: and the words of agreement were: "It is" "mutually agreed between C. J. Humble, Esq." (the son), "owner of the good ship or vessel called the *Ann*," "and Jameson Hunter," the defendant. Humble the son was called as a witness on behalf of the plaintiff, to prove that she was the real owner of the vessel, and that he had signed the charter-party as her agent, and not as principal. This line of examination was objected to on the ground that a person who has signed a contract expressly as principal cannot be admitted to prove, in contradiction to the written instrument, that he was merely an agent. The evidence was received,

1. The question was as to the competency of the witness Raine. Cause was shown on the 11th February, 1848, and the COURT after consideration gave judgment discharging the rule on May 31st, 1848.—A. C.

(2) See *British Waggon Co.* v. *Lea* (1880) 5 Q. B. D. 149, 152, 49 L. J. Q. B. 321.—A. C.

HUMBLE v. HUNTER.

and a verdict found for the plaintiff. *Watson*, in Michaelmas Term, 1847, moved for a new trial on account of the reception of this evidence, and on other grounds. The COURT granted a rule *nisi*, on this point only.

[311] In last Easter vacation (1), and on this day,

Knowles and *F. Robinson* showed cause:

"It is the constant course to show by parol evidence, whether a contracting party is agent or principal:" per PARK, J. in *Wilson* v. *Hart* (2). There the bought note named Reed as the purchaser, but it was held allowable to prove that the defendant was so in reality. A party meaning to act as agent may bind himself in such form that he cannot be treated otherwise than as principal: *Appleton* v. *Binks* (3), where the agent had bound himself, his heirs and assigns, under seal: and it also results from the authorities, that an agent who has made a written contract in his own name cannot adduce parol evidence for the purpose of discharging himself from liability.

(PATTESON, J.: That is the rule I acted upon in *Magee* v. *Atkinson* (4); and the law is so stated in 2 Smith Lead. C. 224, 3rd ed. (5).)

But this does not prevent the principal, for whom the agent has contracted, from suing in his own name, and showing by evidence that he is entitled to do so.

(WIGHTMAN, J.: On a policy of insurance the action is brought in the name of the party who actually executes, or in that of the person entitled to the benefit.)

The rule on the subject is laid down in Smith's Mercantile Law, 144, 4th ed. (6), where it is said that, "where a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him [*312] *to all intents and purposes the principal," but that "the real principal may appear and bring an action on that contract against the purchaser of the goods." [They also referred to Story on Agency, c. 16, s. 420; *Sims* v. *Bond* (7), *Higgins* v. *Senior* (8), *Garrett* v. *Handley* (9),

(1) Cause was shown on May 15th before Lord Denman, Ch. J., Patteson, Wightman and Erle, JJ.
(2) 7 Taunt. 295, 304.
(3) 7 R. R. 672 (5 East, 148).
(4) 46 R. R. 635 (2 M. & W. 440).
(5) Note to *Thomson* v. *Davenport*, 32 R. R. 578 (9 B. & C. 78; 2 Sm. L. C. 11th ed. 404).
(6) Book I. c. 5, s. 5.
(7) 39 R. R. 511 (5 B. & Ad. 389, 393).
(8) 58 R. R. 884 (8 M. & W. 834, 844).
(9) 27 R. R. 405 (4 B. & C. 664).

Bateman v. *Phillips* (1), *Skinner* v. *Stocks* (2), *Cothay* v. *Fennell* (3), and *The Duke of Norfolk* v. *Worthy* (4).]

(ERLE, J.: The effect of recognising the unnamed party in such a case might be that the vendor might find himself under contract to the very person whom he wished to avoid. And in the case of a continuing contract, as, for instance, to supply steam engines, the party contracting to have the supply might find himself dealing with a person incompetent to carry it on.) [313]

The rule may perhaps be confined to contracts not continuing. And the case put is an extreme one, and within the class of those in which the contract is considered personal. * * *

Watson and *Pashley*, *contrà* (5): [314]

The rule that undisclosed principals in contracts may sue and be sued is subject to the paramount rule of evidence that parol testimony is not admissible to vary a written contract. In *Higgins* v. *Senior* (6), where it appeared upon the written contract that the defendant was principal, he was not allowed to discharge himself by showing that he was merely agent, and that the plaintiff knew him to be so. A passage from the judgment in that case has been relied on to show that it may be proved that either of the parties to a written contract was agent only, so as to give the benefit of the contract to his unnamed principal. But this can only be where the agent is not, in terms, described as principal. Here the agent is described as "owner" of the ship, that is as principal; and the terms of the instrument are contradicted by evidence that any other person is the owner. *Bickerton* *v. *Burrell* (7) is exactly in point; [*315] there the contract was signed "J. BICKERTON, for C. RICHARDSON;" and Bickerton, having expressly signed as agent, was not allowed to take the benefit of the contract by showing that he was really the principal.

(LORD DENMAN, Ch. J. referred to *Lucas* v. *De la Cour* (8).)

In *Graves* v. *Boston Marine Insurance Company* (9), where the plaintiff, in his own name singly, caused himself to be "assured"

(1) 38 R. R. 554 (15 East, 272).
(2) 23 R. R. 337 (4 B. & Ald. 437).
(3) 34 R. R. 541 (10 B. & C. 671).
(4) 10 R. R. 739 (1 Camp. 337).
(5) May 29th.
(6) 38 R. R. 884 (8 M. & W. 834).
(7) 5 M. & S. 383.
(8) 14 R. R. 426 (1 M. & S. 249).
(9) 2 Cranch, Rep. 419.

HUMBLE v. HUNTER.

on "property on board the ship *Northern Liberties*," as property may appear, the Supreme Court of the United States held that the policy covered his own interest only, and not that of another also who was jointly interested with him. So, "where one signed a premium note in his own name, parol evidence was held inadmissible to show that he signed it as the agent of another, on whose property he had caused insurance to be effected by the plaintiff, at the owner's request:" Greenleaf on the Law of Evidence, part 2, chap. 15, sect. 281, p. 320 (Boston, U. S. 1842).

LORD DENMAN, Ch. J.:

We were rather inclined at first to think that this case came within the doctrine that a principal may come in and take the benefit of a contract made by his agent. But that doctrine cannot be applied where the agent contracts as principal; and he has done so here by describing himself as "owner" of the ship. The language of Lord ELLENBOROUGH in *Lucas* v. *De la Cour* (1), "if one partner makes a contract in his individual capacity, and the other partners are willing to take the benefit of it, they must be content to do so according to the mode in which the contract was made," is very apposite to the present case.

[316] PATTESON, J.:

The question in this case turns on the form of the contract. If the contract had been made in the son's name merely, without more, it might have been shown that he was agent only, and that the plaintiff was the principal. But, as the document itself represents that the son contracted as "owner," *Lucas* v. *De la Cour* (1) applies. There the partner who made the contract represented that the property which was the subject of it belonged to him alone. The plaintiff here must be taken to have allowed her son to contract in this form, and must be bound by his act. In *Robson* v. *Drummond* (2), where Sharpe, a coachmaker, with whom Robson was a dormant partner, had agreed to furnish the defendant with a carriage for five years, at a certain yearly sum, and had retired from the business, and assigned all his interest in it to C. before the end of the first three years, it was held that an action could not be maintained by the two partners against the defendant, who returned the carriage, and refused to make the last two yearly payments. In this case I was at first in the plaintiff's favour on

(1) 14 R. R. 426 (1 M. & S. 249). (2) 36 R. R. 569 (2 B. & Ad. 303).

account of the general principle referred to by my Lord; but the form of the contract takes the case out of that principle.

WIGHTMAN, J. (1):

I thought at the trial that this case was governed by *Skinner* v. *Stocks* (2). But neither in that nor in any case of the kind did the contracting party give himself any special description, or make any assertion of title to the subject-matter of the contract. *Here the [*317] plaintiff describes himself expressly as "owner" of the subject-matter. This brings the case within the principle of *Lucas* v. *De la Cour* (3) and the American authorities cited.

LORD DENMAN, Ch. J.:

Robson v. *Drummond* (4), which my brother PATTESON has cited, seems the same, in principle, with the present case. You have a right to the benefit you contemplate from the character, credit and substance of the party with whom you contract.

Rule absolute.

BELL *v.* VISCOUNT INGESTRE.

1848. *May* 29.

(12 Q. B. 317—320; S. C. 19 L. J. Q. B. 71.)

[317]

Under a plea traversing the indorsement of a bill of exchange, evidence that the alleged indorser wrote his name on the bill, and delivered it to the alleged indorsee, for the express purpose (5) of retiring other bills, and on the express condition that they should be retired forthwith, and that such condition has not been complied with, is admissible in support of a plea traversing the indorsement.

ASSUMPSIT upon two bills of exchange, drawn by one Edwards, the one for 2,000*l.*, the other for 2,118*l.* 10*s.*, accepted by defendant, and by Edwards indorsed to the Newcastle-upon-Tyne Joint Stock Banking Company. Pleas (among others), traversing the indorsements respectively.

On the trial, before Wightman, J., at the Liverpool Summer Assizes, 1847, the plaintiff proved Edwards's handwriting to the indorsements. The defendant, in *answer, gave evidence that, on [*318] the 8th of April, 1845, on which day the bills bore date, Edwards was liable to the Banking Company to the amount of about 4,000*l.*

(1) Coleridge, J. having heard the argument for the defendant only, gave no judgment.

(2) 23 R. R. 337 (4 B. & Ald. 437).

(3) 14 R. R. 426 (1 M. & S. 249).

(4) 36 R. R. 569 (2 B. & Ad. 303).

(5) See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 21 (2) (b).—A. C.

BELL v. LORD INGESTRE.

on several overdue bills; that Edwards on that day procured defendant's acceptance to the two bills in question, and transmitted them by letter to the Company with his name indorsed upon them, for the express purpose of retiring the overdue bills, and on the express condition that such last mentioned bills should be returned to him by the next post; which condition had never been complied with. Under these circumstances it was contended that the defendant was entitled to the verdict upon the issues as to the indorsements. The learned Judge ruled that the defence should have been specially pleaded, and was not admissible in support of pleas merely traversing the indorsement. Verdict for plaintiff, with leave to move to enter a verdict for defendant. *Martin*, in Michaelmas Term last, obtained a rule *nisi* accordingly.

Knowles, *Watson* and *Unthank* now showed cause:

It may be conceded that, if a person indorse a bill for a particular purpose, and the indorsee negotiate it without consideration, and in contravention of such purpose, trover may be maintained for the bill: *Goggerley* v. *Cuthbert* (1). But such circumstances would not support a plea traversing the indorsement. In the present case the condition of the indorsement has been broken; and the title to the bill is thereby revested in the indorser; but it cannot be said that he did not indorse. *Marston* v. *Allen* (2) and *Adams* v. *Jones* (3) are
[*319] distinguishable; *for in those cases there was no intention to indorse at all to the alleged indorsee.

Martin (with whom was *F. Robinson*), *contrà*:

The condition of the indorsement was a condition precedent; there was no intention to indorse, in the sense given to the word "indorse" in *Marston* v. *Allen* (2), *Adams* v. *Jones* (3) and *Goggerley* v. *Cuthbert* (1). When the bills were sent by Edwards to the Company, with his name on the back of them, he, in effect, said, "until you give back the old bills, you are not to have any interest in the new bills." The bills were delivered as a mere escrow, as was said by HEATH, J. in *Goggerley* v. *Cuthbert* (1). If Edwards had been sued on them and had pleaded specially, the plea would have been an argumentative traverse of the indorsement. (He was then stopped by the COURT.)

(1) 2 Scott's N. R. 170.
(2) 58 R. R. 785 (8 M. & W. 494).
(3) 12 Ad. & El. 455.

LORD DENMAN, Ch. J.:

I think it impossible to distinguish this case from *Marston* v. *Allen* (1) and *Adams* v. *Jones* (2). It is a singular sort of escrow; for the bills were delivered to the parties who, in the event of their performing a certain act, were to be benefited by them. But still I think they were delivered to them as mere trustees, and that the same principle applies.

PATTESON, J.:

I think this case is within the principle of *Marston* v. *Allen* (1) and *Adams* v. *Jones* (2). The facts here are of a different character in some respects; for in those cases it was not intended that the transferee should ever take any interest in the bills. But I *think that [*320]
makes no difference; for here it was not intended that the transferee should take any interest until the old bills were returned; and, until that time, it is the same thing, in principle, as if it had been intended that no interest should pass at any time. The bills were received on terms which were not satisfied; and there was no indorsement.

COLERIDGE, J.:

If there had been in this case the intervention of a third party as agent between the transferor of the bills and the transferees, for the purpose of handing the bills over on performance of the condition, there would have been no difficulty. But, in principle, it is the same thing; for, until the condition was performed, no interest was to pass to the transferees.

WIGHTMAN, J.:

I have had great doubt whether the defence was admissible under the issue; for this case, in its facts, seems to go farther than the cases cited. But, in principle, I find it difficult to distinguish it from *Marston* v. *Allen* (1). The analogy of the escrow would be perfect, if the delivery of the bills had been to an agent. The principle of *Marston* v. *Allen* (1) is that, on a plea traversing the indorsement of a bill, its delivery with intent to transfer an interest is put in issue.

Rule absolute.

(1) 58 R. R. 785 (8 M. & W. 494). (2) 12 Ad. & El. 455.

1848.
May 31.

[419]

REG. *v.* SHAW.

(12 Q. B. 419—429; S. C. 17 L. J. M. C. 137; 12 Jur. 651.)

By a private Inclosure Act (25 Geo. II. c. 23), an annual rent of 90*l.* was vested in the rector of a parish, to be issuing and payable out of certain common fields to be inclosed by virtue of the Act, as well such as should be allotted to the rector in lieu of his glebe lands lying in the said common fields, as the lands of the other freeholders lying therein, and to be paid free and clear of and from all deductions, defalcations or abatements for or in respect of reprises or outgoings whatsoever, other than such proportion of the tax charged upon land by authority of Parliament as the said rent of 90*l.* should bear to the yearly value of the lands charged with such rent. The rent was to be in lieu of all tithes arising out of the lands to be inclosed, and also out of the homesteads and gardens of the parish, generally: but the right of the rector to the other tithes of the parish was expressly reserved. For the last mentioned tithes the rector was always assessed to the poor rate.

Held, that the rector was not rateable to the poor in respect of the rent of 90*l.* payable in lieu of tithes.

On appeal (by Richard Pratt, farmer) against a poor rate made for the parish of Narborough, in the county of Leicester, the Sessions confirmed the rate, subject to certain amendments, one of which was, that the Rev. Edward Butterworth Shaw, the rector of the parish, should be assessed at the annual rent, or yearly sum, of 90*l.*, vested in, and made payable to, him, under stat. 25 Geo. II. c. 23 (private), in the same proportion as he is now rated in respect of his tithe, subject nevertheless to the opinion of this Court on a case, in substance, as follows.

By stat. 25 Geo. II. c. 23, intituled "An Act for dividing and enclosing the common fields and common meadows of Narborow, otherwise Narborough, in the county of Leicester," after reciting, amongst other things, "that William Woollaston, Esq., was lord of the manor of Narborow aforesaid, and patron of the advowson of the rectory and parish church of N. aforesaid, and was also owner and proprietor of certain lands and grounds in the said common fields and meadows of N. aforesaid, and Thomas Metcalfe, clerk, was

[*420] rector of the parish of N. aforesaid, and in right of his said *church was seised of, and entitled to, certain glebe lands, lying and being in the said common fields and common meadows of N. aforesaid, and was also seised or entitled to other glebe lands lying and being within the said parish, and was entitled to all tithes arising and renewing within the said common arable fields of N., and also to other tithes arising or renewing within the said parish, but that the said rector was not entitled to the tithes of the said common meadows; and that the rest of the lands and grounds lying and being in the

said common fields and common meadows of N. aforesaid did belong to and were the property of certain persons therein named and other freeholders within the said manor and parish of N.: and also reciting that the said William Woollaston and Thomas Metcalfe, and the owners and proprietors of lands and grounds in the said common fields and meadows, were desirous that the said common fields and meadows might be divided and inclosed by the Commissioners in that behalf to be appointed, and that the several shares and allotments might be laid out and disposed as commodiously as possible for the parties interested, and might be held in severalty, for such estates and interests as they then respectively held in the said common fields and meadows; and that the several lands and grounds, to be allotted to the said owners or proprietors respectively upon the said division and inclosure, might be proportionably charged with the payment of the yearly sum of 90*l.* to the said Thomas Metcalfe and his successors, rectors of N. aforesaid, for ever, in lieu of, and in compensation for, all tithes arising and renewing within the said parish of N. aforesaid, except as is thereinafter *mentioned: It [*421] is enacted, amongst other things, "that one annual rent or yearly sum of 90*l.*, of lawful money of Great Britain, shall from and after the said first 1st day of November, A.D. 1752, be vested in, and the same is hereby, from henceforth, vested in the said Thomas Metcalfe, and his successors, rectors of N. aforesaid, for ever; and the same annual rent or yearly sum of 90*l.* shall be issuing and payable out of, and is hereby charged upon, all and every the lands and grounds so intended to be enclosed, as well such as shall be allotted to the said rector, in lieu of his glebe lands lying in the said common fields and common meadows, as the lands of the other freeholders, and landowners in the same common fields and common meadows respectively; and shall be paid and contributed, free and clear of and from all deductions, defalcations, or abatements, for or in respect of reprises or outgoings whatsoever (other than and except such proportion of the tax charged upon land by authority of Parliament, as the said annual rent of 90*l.* shall bear to the yearly value of the lands so hereby charged with, or made liable to, the payment of the same rent, as aforesaid), by the several and respective owners of the lands and grounds chargeable therewith, as aforesaid, for the time being, for ever, in and by such proportions, as the said Commissioners, and their successors, or any three or more of them, shall, in manner hereinafter mentioned, ascertain, direct, or appoint; wherein due regard is to be had to the quantity and quality of the said respective

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new divisions, shares, and allotments, and so as the said proportions may be just and equitable; and which said annual rent or yearly sum of 90*l.* shall be paid in such shares, proportions, and contributions, as aforesaid, at or on " &c. *(Michaelmas and Lady Day), " in every year for ever; the first payment thereof to begin, and be made at or on the feast of Saint Michael, A.D. 1753." Then followed a power of distress, from time to time, in case of non-payment. And it was further enacted, " that the said yearly sum of 90*l.* so hereby enacted and directed to be paid to the said T. M. and his successors " &c., " by such contributions and proportions, and in manner afore mentioned, shall be in lieu and satisfaction of, and in full compensation of and for, all tithes, both great and small, and all compositions and payments for the same, arising and renewing within the said fields, so intended and appointed to be divided and inclosed, as aforesaid; and also in lieu and satisfaction of, and in full compensation for all tithes, dues, and payments, of what sort, nature, or kind soever, due and payable to the rector of N. aforesaid, for the time being, from the inhabitants of the town of N. aforesaid for the time being for themselves and their habitations, and for all things titheable, arising, renewing, or happening within, upon, from, and out of their yards, gardens, orchards, and homesteads, situate and being in and about the town of N. aforesaid, other than and except in respect of " certain orchards belonging to two persons in the Act named: " and other than and except in respect of all the houses in the said town of N., to which no lands or grounds in the said common fields or meadows do now belong, or are now deemed to belong, and the inhabitants, for the time being, of such last mentioned houses, and every thing titheable to such last mentioned houses now belonging, or now deemed to belong, within the parish of N. aforesaid." And it was thereby further enacted, " that nothing in this Act contained shall impeach, defeat, or prejudice the right or title of the said T. M., or his successors " *&c., " of, in, or to any tithes or dues arising within or out of any parts of the parish of N. aforesaid, other than such tithes and dues for which the said annual rent or yearly sum of 90*l.* hereby vested in the said rector, and his successors, is hereby enacted and declared to be a recompense or compensation, as aforesaid; nor of, in, or to any marriage, burial, churching, or other surplice fees, arising within the said parish of N. aforesaid."

[*422]

[*423]

By the award of the Commissioners, made by virtue and in pursuance of the said recited Act, and dated the 10th November,

1752, the Commissioners did, amongst other things, award that the lands and grounds in and by the said award severally set out and allotted to the respective persons therein named, and the same several persons and the owners thereof for the time being for ever, for and in respect thereof, should be, and they were thereby, charged with the payment of the said annual rent or yearly sum of 90*l.*, so vested in the said Thomas Metcalfe and his successors, in and by the proportions in the said award specified and particularised, amounting together to the sum of 90*l.*; one of which proportions or sums so specified and particularised is the sum of 4*l.* 6*s.*, charged upon the lands and grounds allotted to the said Thomas Metcalfe and his successors.

The respondent, the said E. B. Shaw, was, at the making of the rate and assessment appealed against, rector of Narborough; and the said annual rent or yearly sum of 90*l.* was then vested in him. The respondent was assessed to the said rate in respect of the tithes of the lands of the said parish subject to tithe, other than the lands allotted by the said award; but was not assessed in respect of the said sum of 90*l.* so charged upon the said lands allotted by and in pursuance of the before recited award and Act of Parliament.

It was contended for the appellant that the respondent must be [424] rated in respect of the said annual rent of 90*l.* granted to him in lieu of tithes arising out of the lands enclosed under the Act of Parliament and the award above recited. For the respondent, it was contended that he was not liable to be rated in respect of the said rent-charge. The Sessions decided that he was liable to be so rated, and that the rate should be amended accordingly.

If this Court should be of opinion that the decision of Sessions was right, then the order of Sessions, so far as it related to the assessment of the said annual rent-charge of 90*l.*, was to be confirmed. But, if they should be of opinion that the decision of Sessions was wrong, then the order of Sessions was to be quashed, so far as it related to that assessment.

Whitehurst and *Barlow*, in support of the order of Sessions:

The rector was liable to the poor rate in respect of the annual rent of 90*l.* payable in lieu of tithe. A money payment, in lieu of tithe, is rateable to the poor, unless it be expressly exempted: *Rex* v. *Boldero* (1), *Rex* v. *Wistow* (2). The same law has been laid down

(1) 28 R. R. 530 (4 B. & C. 467). (2) 44 R. R. 408 (5 Ad. & El. 250).

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as to liability to highway rate: *Rex* v. *Lacy* (1). This rent is to be paid free "of and from all deductions, defalcations, or abatements, for or in respect of reprises or outgoings whatsoever." The word "reprise" signifies a resumption or taking back, used for such deductions as rent-charges or annuities: Jacob's Law Dict. tit. "Reprise." Nor is the poor rate an "outgoing" of the land or rent; for it is a personal tax. The land tax, which is excluded [*425] from the exempting *clause, may be considered both a "reprise" and an "outgoing." In *Mitchell* v. *Fordham* (2) the corn rent in lieu of tithes was payable "free from all taxes and other deductions whatsoever, except the land tax;" and in *Chatfield* v. *Ruston* (3) the words were "free and clear from all rates, taxes, and deductions whatsoever." There are no equivalent words here: and another distinction is, that in those cases the commutation payment was in lieu of the whole tithes of the parish; whereas here the bargain is between the rector and a certain portion only of the parishioners, and the other parishioners derive no benefit from the bargain, either by a share in the inclosed land, or by exemption of the other land from tithe.

(COLERIDGE, J.: If the rector had a smaller rent awarded to him by reason of his exemption from rate, the arrangement seems quite equitable.)

The amount taken from him is not divided among the whole parish.

(COLERIDGE, J.: Still the parishioners who benefit by the difference pay rate for it, and they pay an advanced rate because their land, being tithe free, yields a better rent.)

Hill and *Corner*, *contrà*:

(COLERIDGE, J.: The rent-charge is not payable clear of all reprises or outgoings, but clear of all deductions in respect of reprises and outgoings, except land tax. The deduction excluded, therefore, must be in respect of some reprises or outgoings which would have included land tax, if it had not been expressly excepted. The statute seems to refer to the amount up to the time of its payment to the rector, and says it shall be paid short only of land [*426] tax. *But no provision is made as to the money after it has come

(1) 5 B. & C. 702.
(2) 6 B. & C. 274.
(3) 3 B. & C. 863.

into his hands. Is it not, then, left to ordinary parochial charges? If the Act had said that the rector was to have 90*l.* subject to payment of land tax, I should have had no difficulty.) REG. v. SHAW.

If the whole parish had been divided by the Act into two parts, the one part tithe free, the other not, the whole would yield as much rate as before it was divided; for the tithe free lands would give more rent, and therefore more rate. It may be considered that the statute has effected a statutable lease of the tithes, and that the rent-charge is payable as rent under such lease; in that case the titheowner is not rateable for the rent. The tithe is not extinguished, but still exists, as in *Rex* v. *Hambleton* (1). There it was enacted that the tithes of a parish should be held by a landowner, and that his land should be charged with an annuity payable to the vicar, in lieu of tithe: and it was held that the vicar was not rateable to the poor, as the tithe was not extinguished, but existed in other hands. But the real ground of exemption here is, that the words of the statute distinctly convey an intention that the rector should hold his rent-charge free from all deductions or charges upon it except land tax.

LORD DENMAN, Ch. J.:

I think that the overseers were right in not assessing the rector to the poor rate in respect of this rent-charge, and that the amendment of the Sessions is wrong. I cannot doubt that it was intended the rector should receive the annual payment of 90*l.*, clear of all deductions, either at the time of payment *or afterwards, except [*427] the land tax. Some doubt has been suggested whether an exemption of the rector from poor rate, in respect of this rent-charge, will not improperly affect the interests of other parishioners. But we must take the Act as we find it. I do not know whether the other parishioners were parties, or not, to this statutory arrangement. I should suppose they were; for it appears that, if they had not been so, their interests could not fairly have been dealt with.

PATTESON, J.:

I quite agree that express words were necessary for the exemption of this rent-charge from rateability. The precise meaning of "outgoing" may be open to doubt; but it is certainly a large word, and may fairly comprehend rates and taxes. It is said that this

(1) 1 Ad. & El. 145.

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case is not within the principle of *Mitchell* v. *Fordham* (1) and *Chatfield* v. *Ruston* (2), because the tithes of the parish are not entirely commuted, but only the tithe of such lands as are the subject of the allotment; and it is said injustice will be done to the occupiers of other lands, who are subject to poor rate, if the rector is not rateable for his rent-charge. But I do not see that such a consequence will necessarily follow; for the occupiers of the allotted lands, which are made tithe free, will be rated higher on that account. It has been argued that the words of the exemption are, not that the rector is to have the amount clear of all deductions, but that it is to be so paid to him, and that, therefore, the deductions contemplated are such deductions as would be made by the occupier, in respect of land tax, for instance, before he *pays over to the rector. But this is a very strict construction of the statute. I think the real meaning is, that the rector is to be exempt in respect of all outgoings, whether before or after the money is paid to him, except land tax.

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COLERIDGE, J.:

After a good deal of doubt, I have arrived at the same conclusion. I have not come to this decision with any reference to the financial arguments addressed to us; for such arguments are of a very nice and perplexing character; and I cannot think that they were adverted to by the Legislature in framing this statute. I rather rely upon the words of the statute; if there are any words which apply to the money after it is paid over to the rector, the exemption is large enough to include poor rate. Now in *Rex* v. *East Teignmouth* (3) it was held that land tax was a parochial rate, within stat. 6 Geo. IV. c. 57, s. 2. I mention this case to show also that the Courts put a very liberal construction on Acts relative to the duties of overseers. Any one using popular language would consider poor rate an outgoing. The only doubt I had was whether the words of this statute applied to the money after it came into the rector's hands. The words seem, certainly, rather to refer to him who pays than to him who receives. But this might have been said in *Mitchell* v. *Fordham* (1) and *Chatfield* v. *Ruston* (2); for there the words describing the corn rents were "issuing and payable." It is certainly important to construe these Acts according to the intention and in the same way; for all *these private Acts have the

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(1) 6 B. & C. 274.
(2) 3 B. & C. 863.
(3) 1 B. & Ad. 244.

same object, and litigation is prevented by such a principle of construction.

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ERLE, J.:

I am of the same opinion. I think the words here are equivalent to those in the cases last cited.

Order of Sessions quashed.

CLAYARDS *v.* DETHICK AND DAVIS (1).

1848. *June* 2.

(12 Q. B. 439—448.)

[439]

In an action for damage occasioned by the defendant's negligence, a material question is, whether or not the plaintiff might have escaped the damage by ordinary care on his own part. But the defendant is not excused merely because the plaintiff knew that some danger existed through the defendant's neglect, and voluntarily incurred such danger. The amount of danger, and the circumstances which led the plaintiff to incur it, are for the consideration of the jury.

Therefore, where Commissioners of Sewers had made a dangerous trench in the only outlet from a mews, putting up no fence, and leaving only a narrow passage on which they heaped rubbish; and a cabman, in the exercise of his calling, attempted to lead his horse out over the rubbish, and the horse fell and was killed, for which loss he brought an action: Held, that the plaintiff was not disentitled to recover because he had at some hazard, created by the defendants, brought his horse out of the stable: And that the case was properly left to the jury on the question whether or not the plaintiff had persisted, contrary to express warning at the time (as to which there was contradictory evidence), in running upon a great and obvious danger.

CASE. The declaration stated that, before and at the time of the committing &c., plaintiff was, and from thence hitherto hath been, and still is, lawfully possessed of a certain messuage and stables with the appurtenances situate in the parish of St. Giles in the Fields, Middlesex; and, by reason thereof, plaintiff during all the time aforesaid ought to have had, and still of right ought to have, a certain way for himself and his servants, on foot and with horses, cattle and carriages, to go, return, &c. from and out of the said messuage and stables unto, into, through &c. a certain close called Gower Mews, situate &c., contiguous to and adjoining the said messuage and premises, and from and out of the same into a certain common highway in the county aforesaid, and so from thence back

(1) This case was doubted by Lord BRAMWELL in *Lax* v. *Darlington Corporation* (1879) 5 Ex. D. 28, 35, 49 L. J. Ex. 105, and *MacMahon* v. *Field* (1881) 7 Q. B. D. 591, 594, 50 L. J. Q. B. 552; and was criticised by him in a memorandum which is printed in Appendix B. to Smith on Negligence (2nd ed. p. 275).—A. C.

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again from the said highway unto, into, through &c. the said close called Gower Mews unto and into the said messuage, stables &c. of the plaintiff, to go, return, &c., at all times of the year &c., as to the said messuage and premises &c. belonging and appertaining: yet defendants, well knowing the premises and contriving to injure [*440] plaintiff, whilst he was so possessed of his said messuage *and stables &c., to wit on &c. and on other days between that day and the commencement of this suit, wrongfully and injuriously dug a certain trench in and along the said close, of great depth, length and width, to wit &c. (stating dimensions), and wrongfully and injuriously heaped, piled and placed divers large quantities of earth, gravel and rubbish in and upon the said close, and wrongfully and injuriously continued the said trench so dug, and the said quantities of earth &c. so heaped &c. for a long time, to wit &c., and, during all that time, wrongfully and injuriously neglected to fence or otherwise secure the said trench so as to prevent accidents and injuries to persons passing along and using the said way, and, during all that time, greatly incumbered and obstructed the said close and said way of the plaintiff: by means of which premises plaintiff could not during all the time aforesaid have, enjoy and use his said way in so full, ample and beneficial a manner as he theretofore had been accustomed to do, and during all that time ought &c. and otherwise would &c.; and also, by means of the premises, a horse of the plaintiff of great value, to wit &c., with which plaintiff during the time aforesaid, to wit on &c., was lawfully passing in and along the said way of the plaintiff from the said highway to the said messuage and stables of the plaintiff, stumbled, slipped and fell over the said earth, gravel and rubbish, so heaped &c. as aforesaid, into the said trench so dug by the defendants as aforesaid: and the said horse thereby then became and was strangled and killed: and also &c. (destruction of harness): To plaintiff's damage of 50*l.*

Pleas: 1. Not guilty. Issue thereon.

[*441] 2. As to digging the trench &c., and heaping &c., *and continuing &c., and encumbering &c.: That defendants did the several acts by the authority of a certain commission of sewers for the limits of the Holborn and the Finsbury divisions &c., for the purpose of building and making a sewer in and along the said close within the limits of the said commission, and according to stat. 23 Hen. VIII. c. 5. Verification.

Replication: *De injuriâ.* Issue thereon.

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On the trial, before Lord Denman, Ch. J., at the sittings in Middlesex after Easter Term, 1847, it appeared that the plaintiff was a cab proprietor, having stables in Gower Mews, Gower Street. The mews communicated with the street by a passage 18½ feet wide and 56½ feet long, and had no other outlet. In November, 1845, the defendants, acting under directions from the Commissioners of Sewers, were deepening a sewer in Gower Street, and carrying a drain, in communication with it, up the passage leading into Gower Mews. For this purpose they made an open trench about 18 feet long and 6½ feet wide, but not in the middle of the passage, the unbroken space on one side being about 4½, and on the other side 2½ feet wide. The opening was not fenced. Before the day on which the accident in question happened, the Commissioners had given notice to the occupiers of stables in the mews that the trench would continue open for a day or two longer, and they must put up with it; and had advised them to get other stables. On November 19th, the excavators had thrown the earth and gravel from the trench (unavoidably as was represented on behalf of the defendants) upon the wider space between the trench and the wall, to the height of four feet. About five in the afternoon of that day, the plaintiff *was bringing one of his horses out of the mews, and was about to [*442] put down planks for the purpose of getting him over the narrower space, which was least obstructed. The defendant Davis asked him what he was going to do, and said he would not be answerable for any thing that happened by taking the horse over in that manner. The plaintiff asked how he was to do it; and said that he must get the horse out. The defendant said: "Take him over on the other side; and I will be answerable." The plaintiff, with assistance, led the horse out, over the gravel. A little before six in the same evening, the plaintiff endeavoured to get another horse out in the same direction (neither defendant being then present); but the rubbish gave way; the horse fell into the trench, and was strangled in an endeavour to drag him out with ropes. The value of the horse was stated to be 20*l*.

Evidence was given, on the part of the defendants, that, on this second occasion, their men cautioned the plaintiff not to make the attempt, for that he would endanger, not only his horse, but the lives of men who were in the trench; but that the plaintiff said he did not care, and would go over. This statement was denied on the part of the plaintiff.

The LORD CHIEF JUSTICE, in summing up, left it to the jury, in

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the first place, to say whether the defendants had been guilty of culpable negligence in not fencing the trench. His Lordship then observed that, if the defendants' witnesses were to be believed, and the plaintiff on the second occasion had, in defiance of warning, incurred an evidently great danger, this was a rashness on his part, which would excuse the defendants: but that it could not be the [*443] plaintiff's duty to *refrain altogether from coming out of the mews merely because the defendants had made the passage in some degree dangerous: that the defendants were not entitled to keep the occupiers of the mews in a state of siege till the passage was declared safe, first creating a nuisance and then excusing themselves by giving notice that there was some danger: though, if the plaintiff had persisted in running upon a great and obvious danger, his action could not be maintained. And he left it to the jury to say whether or not the plaintiff had so acted. Verdict for plaintiff: damages 20*l.*

Miller, in Trinity Term, 1847, moved for a new trial on the ground of misdirection.

He cited *Proctor* v. *Harris* (1), *Drew* v. *New River Company* (2) and *Hawkins* v. *Cooper* (3), as showing that a plaintiff cannot recover for damage caused by negligence where the injury has been partly occasioned by negligence of his own; and he contended that the plaintiff here committed such fault by attempting to bring his horse out of the mews, if the passage was at all dangerous; and that, instead of incurring danger even if it had been slight, he should have kept his horse in the stable, and brought an action, if necessary, for the obstruction.

(LORD DENMAN, Ch. J.: I thought the plaintiff might be justified in incurring a moderate danger, and that the facts proved as to the first coming out showed it to be no more.)

A rule *nisi* was granted.

Knowles and *Corrie* now showed cause:

The complaint in the declaration is that the defendants made a [*444] *trench in the highway and neglected to fence it, and that the injury resulted from that neglect. The facts so stated are proved, and the evidence not answered.

(1) 34 R. R. 810 (4 Car. & P. 337).
(2) 6 Car. & P. 754.
(3) 8 Car. & P. 473.

(WIGHTMAN, J.: The averment is that "by means of the premises" the plaintiff's horse fell &c. The defendants say that it was not merely by those means, but partly by the plaintiff's negligence.)

The LORD CHIEF JUSTICE left to the jury, substantially, whether the plaintiff was in fault at all. And he was not. He could not afford to keep his horse at home.

(COLERIDGE, J.: If the horse was wrongfully detained at home, an action lay for that.)

The declaration here complains of the obstruction, but of the special damage also. The plaintiff was justified in believing, on Davis's own representation, that he might without rashness lead the horse out; there was not, therefore, that want of ordinary care which disentitles a plaintiff to recover for negligence in the defendant, according to the doctrine of *Butterfield* v. *Forrester* (1), *Bridge* v. *The Grand Junction Railway Company* (2) and *Davies* v. *Mann* (3). The principle recognised in those cases is maintained, and even carried farther than the present plaintiff is bound to follow it, in *Lynch* v. *Nurdin* (4). The duty of Commissioners of Sewers in providing safeguards and giving specific notice of danger is strictly laid down by ABBOTT, Ch. J. in *Jones* v. *Bird* (5).

Miller, contrà:

The question here was, whether the plaintiff did not in a great measure cause his own misfortune *by acting without reasonable caution. He ought not to have attempted to pass at all, at the time when the accident happened. His doing so cannot be imputed to the defendant Davis: the conversation with him which has been relied upon took place in a different part of the day. And it seems that at the former time the plaintiff had assistance, at the latter, not. [*445]

(COLERIDGE, J.: Had the state of the premises been altered?)

It is evident that the work had been going on. In *Butterfield* v. *Forrester* (1), the leading case applicable to this subject, it is expressly laid down that two things must concur to support the action; "an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff."

(1) 10 R. R. 433 (11 East, 60).
(2) 49 R. R. 590 (3 M. & W. 244).
(3) 62 R. R. 698 (10 M. & W. 546). See *Mayor of Colchester* v. *Brooke*, 68 R. R. 458 (7 Q. B. 339, 377).
(4) 55 R. R. 191 (1 Q. B. 29).
(5) 24 R. R. 579 (5 B. & Ald. 837, 844).

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(COLERIDGE, J.: If a man is lying drunk on the road, another is not negligently to drive over him. If that happened, the drunkenness would have made the man liable to the injury, but would not have occasioned the injury.)

Here the plaintiff had an obvious danger before him, and was not justified in encountering it to avoid a delay. For that he might have had a legal remedy: if he chose rather to incur a danger, he might do so, but not at the cost of the defendants. If an extraordinary emergency had arisen, as a fire, the case might have been different.

(PATTESON, J.: Suppose the horse had been coming home; must he have been kept out of the stable till the entrance was pronounced safe?)

The plaintiff might have placed the horse at livery and brought an action for the keep.

PATTESON, J.:

[*446] The question arises on the declaration; because it is there said that the defendants made *the trench, and laid rubbish, and neglected to fence, and that "by means of the premises" the plaintiff's horse fell and was killed. The averment, "by means of the premises," becomes parcel of the issue on Not guilty. And, such being the issue, we are to say whether it was properly left to the jury. Now the defendants had clearly no right to leave a trench open in the passage to this mews without a proper fence, and, having done so, to tell the plaintiff "you shall keep your horse in the stable till we inform you that you may remove him." But whether or not the plaintiff contributed to the mischief that happened by want of ordinary caution, is a question of degree. If the danger was so great that no sensible man would have incurred it, the verdict must be for the defendants: and the case was rightly put to the jury as depending on this question. The plaintiff here had passed safely in the afternoon over the place at which the accident happened. According to the evidence for the defendants, he was told, on attempting to pass in the evening, that he could not do it without danger to himself and the men below. The jury, however, do not appear to have believed this statement. The whole question was, whether the danger was so obvious that the plaintiff could not with

common prudence make the attempt. That was properly put to the jury; and they have found for the plaintiff.

COLERIDGE, J.:

The question is, not only whether the defendants did an improper act, but also whether the injury to the plaintiff may legally be deemed the consequence of it. The defendants say that that injury was the result of his own wrongheadedness in attempting to pass when he was told that it could not be *done without risk to his [*447] horse and to the men below. Then, was the question on this point properly left to the jury? I understand the LORD CHIEF JUSTICE to have expressed himself strongly against the view taken by the defendants' counsel, but to have put the question in the manner which appears correct, by asking, namely, whether the plaintiff acted as a man of ordinary prudence would have done, or rashly and in defiance of warning. The plaintiff was not bound to abstain from pursuing his livelihood because there was some danger. It was necessary for the defendants to show a clear danger and a precise warning. Whether these facts existed or not, was for the consideration of the jury; and, if the jury disbelieved them, the plaintiff was entitled to the verdict.

WIGHTMAN, J.:

The words in the declaration "by means of the premises" raise the whole question. It seems that, in the earlier part of the day, one of the defendants had pointed out a way of bringing the horse over; but it is urged that, on the second occasion, the plaintiff had distinct warning that there was danger, both to his horse and to the men in the trench; the state of things having, as would appear by that representation, been altered since the first coming out. But on that point there was contradiction in the evidence. If it had appeared that the plaintiff, in defiance of warning, would persevere in the attempt to pass, I cannot suppose that the jury would have found a verdict in his favour. I think, therefore, we must assume that they considered the defendants' contradiction not satisfactory: and I am of opinion that the case was properly left to them as to the defiance of warning.

LORD DENMAN, Ch. J.: [448]

The case was complicated; and there was contradiction on almost every point. I have no doubt that I left it to the jury to say whether

CLAYARDS v. DETHICK.

the plaintiff had used ordinary care; for I always leave cases of the kind in that manner. I certainly told the jury that the plaintiff was not bound to keep his horse back unless the danger was imminent: and I believe they gave credit to the plaintiff's evidence, and not to the evidence for the defendants.

Rule discharged.

1848.
June 5.

[460]

RYAN *v.* SAMS.

(12 Q. B. 460—465; S. C. 17 L. J. Q. B. 271; 12 Jur. 745.)

Defendant and a Mrs. S., his mistress, lived together as husband and wife four years, and occupied three residences successively. At each time of their coming into a house, plaintiff was employed to do work and furnish materials for the fitting up. Mrs. S. as well as the defendant gave directions; and the defendant sanctioned her orders and paid the bills. Plaintiff knew that she was only his mistress. While residing in the third house they separated; but Mrs. S., without defendant's sanction, sent for plaintiff to that house, which she had not yet left, and ordered fittings up for a new house of her own. Plaintiff did the work, and had not, in the mean time, any notice of the separation.

Held, in an action for the last mentioned work and goods, that it was a proper question for the jury, whether or not the defendant had given the plaintiff reason to believe that Mrs. S., at the time of the orders, continued to be defendant's agent; and that, on their finding in the affirmative, the defendant was liable.

DEBT for goods sold and delivered, and work and materials, and on an account stated. Plea (except as to 9*l.* parcel &c., which was paid into Court): Never indebted. Issue thereon.

On the trial, before Erle, J., at the sittings in Middlesex during the present Term, it appeared that the plaintiff was a frame and looking-glass maker, and brought the present action for work done and materials used in the fitting up of rooms in Upper Seymour Street West, for a Mrs. Stanley, in January, 1847, and the following months. The defendant and Mrs. Stanley had lived together in 1843 as husband and wife, she being in fact his mistress. At a house where they then lived, they had together given orders to the plaintiff for putting up cornices, which the defendant paid for. The defendant had another house at which he employed the plaintiff, and had desired the plaintiff not to mention there what was taking place at the house where Mrs. Stanley lived: he had also, in the course of subsequent dealings, used other expressions intimating to the plaintiff the real nature of the connection between her and himself. When residing with her, he had gone by the name of Stanley, and desired to be called so. The defendant and Mrs.

[*461] Stanley lived together till November, *1846, when they separated.

During the period from 1843 to 1846 they removed to two other residences, and on each occasion orders for fittings up, in the plaintiff's way of business, were given by the defendant or by Mrs. Stanley, and the defendant paid the bills. The plaintiff received no notice of the separation. In December, 1846, Mrs. Stanley took a house for herself in Upper Seymour Street West, and gave the plaintiff orders like the former ones. At that time she was still at the house where she had last been living with the defendant; and the orders were given there. They were executed, and the bill sent in to the defendant, who refused to pay. He never went to the house in Upper Seymour Street West, nor gave any other authority for the last orders than might be inferred from the former transactions. *Humfrey*, for the defendant, cited *Munro* v. *De Chemant* (1) and contended that the plaintiff must be nonsuited. ERLE, J., was of a different opinion, but reserved leave to move for a nonsuit; and the plaintiff had a verdict.

Humfrey now moved for a rule to show cause why a nonsuit should not be entered:

In *Munro* v. *De Chemant* (1) the defendant had lived with a lady as his wife, and represented that she was so, for many years, and then discarded her; the plaintiff afterwards supplied her with necessaries, and contended that, even if she was not the defendant's wife, he was liable on the credit he had given her. But Lord ELLENBOROUGH said: "Had the goods been furnished while the defendant was living with this lady, his representation that she *was his wife would have been conclusive against him: but I think [*462] his liability for necessaries supplied to her after they had separated depends entirely upon whether he really has been lawfully married to her or not." And he told the jury that, if, on the evidence, they thought she was not the defendant's wife, the action could not be maintained (2). The present case is still more unfavourable to the plaintiff. If Mrs. Stanley was at one time invested with a credit as the defendant's agent, how long must such an agency be deemed to continue?

(LORD DENMAN, Ch. J.: As long as the party who has trusted on the faith of it remains uninformed of a change.)

The Court would not go so far in the case of a discharged servant.

(1) 4 Camp. 215. (2) The jury found for the plaintiff.

RYAN v. SAMS.

(LORD DENMAN, Ch. J.: That is a different relation.)

The plaintiff here knew that the parties were not married.

(PATTESON, J.: He had reason to suppose that they were going to live together at the last house as at the former ones.

LORD DENMAN, Ch. J.: When the orders in question were given, it would appear to him that they were residing together as before. The defendant had confided to him the terms upon which he was living with Mrs. Stanley, but had not told him of the separation.)

The case, as to the impression made upon the creditor, is the same as if a servant, about to leave his place, but still living at his master's house, directed goods to be sent to another house.

(ERLE, J.: The orders, in the former instances, had all been given on occasions of removing, and were for fittings up and such matters as are required on transit from one lodging to another.

[*463] PATTESON, J.: The facts in *Munro* v. *De Chemant* (1), are *not fully stated. I should judge it to have been notorious that the parties had separated.)

If in that case no express notice of the cessation of agency was requisite, neither is it so here.

LORD DENMAN, Ch. J.:

In *Munro* v. *De Chemant* (1) it may be presumed that the parties had lived long separate; and it is consistent with the statement there that Lord ELLENBOROUGH may have noticed that circumstance as important if the parties were not married, but told the jury, "if you think they are proved to have been man and wife, the case will be different." And the order there seems to have commenced a new account. Here the defendant sanctions orders to the plaintiff in the name of Stanley while the person in question is living with him under that name; and she afterwards gives orders to the plaintiff in the same name, circumstances apparently continuing unaltered. It would be unreasonable to expect more evidence in such a case.

PATTESON, J.:

There certainly was evidence here on which the jury might find for the plaintiff. The defendant and Mrs. Stanley had lived

(1) 4 Camp. 215.

together at three places, and, at each of them, had been supplied with goods by the plaintiff. It seems the defendant had never represented Mrs. Stanley as his wife; he was known to the plaintiff, and, at the places where Mrs. Stanley lived, desired the plaintiff to call him Stanley. But he authorised the plaintiff to supply her at those places on his credit; and this happened during *two [*464] changes of residence. Then they separated; but, when the orders in question were given, Mrs. Stanley remained at the place where she had last lived with the defendant, and the defendant had not sent the plaintiff any notice of the separation. Before the orders were executed, she had removed: but if the goods had been sent in at the last place of residence it would clearly have been on the defendant's credit; and what difference does it make, on the case proved, that they were supplied at a fourth place?

COLERIDGE, J.:

In *Munro* v. *De Chemant* (1) the direction may have proceeded on the defendant's marital liability. He had represented a lady as his wife for so many years, that it might properly be put to the jury whether that representation was not even yet conclusive of the fact. So taken, Lord ELLENBOROUGH'S view of the case is the right; and if the jury adopted the conclusion there could be but one result. Here the question is merely of agency: there have been three changes of residence, and orders of the same kind on each removal. The nature of the orders in each instance is material, as my brother ERLE has noticed. The orders now in question are given while she is still in the place of her last residence with the defendant, and without any notice to the plaintiff of their having separated. It is true they had been apart about a month when the goods were sent in: but suppose that had been on the very day of the separation; would there be no evidence of agency? And the time which elapsed makes no difference in principle.

ERLE, J.: [465]

I left it to the jury to say whether the defendant had so acted as to induce the plaintiff to believe that Mrs. Stanley was still his agent. I agree that there is no ground for a rule.

Rule refused.

(1) 4 Camp. 215.

1848.
June 6.

PIKE *v.* STEPHENS.

(12 Q. B. 465—478; S. C. 17 L. J. Q. B. 282; 12 Jur. 746.)

[465]

Held, under stat. 2 & 3 Vict. c. 29, s. 1 (see now (1) stat. 12 & 13 Vict. c. 106, ss. 1, 133), that a *bonâ fide* execution is defeated by bankruptcy, if notice of an act of bankruptcy be served on the plaintiff's attorney at any time, however short, before seizure; though the notice is served in London, and the writ has been sent into a bailiwick in the country.

But that a mere delivery at the attorney's chambers, as in the case of notices in a cause, is not sufficient: and that the service must be on the attorney himself, or a clerk so far entrusted with the management of his business as to have the power of acting on such a communication in his absence.

And, therefore, that an announcement of bankruptcy, made at the attorney's office, to a person who had lodged the writ of execution with the sheriff, but was not further described in evidence than as clerk to the attorney, did not affect the client, the execution creditor.

CASE. The declaration stated that the plaintiff recovered judgment against William Toms and John Matthews in an action of debt, and thereupon sued out a *fi. fa.* directed to the Sheriff of Berkshire, which writ, indorsed &c., was delivered to defendant, being Sheriff of Berks, to be executed: that there were in the bailiwick goods and chattels which might have been seized and sold under the writ, and it became and was the duty of defendant as sheriff to serve and levy, and defendant, as such sheriff, could and might and ought to have served and levied, the said execution by seizure of such goods and chattels within a convenient and reasonable time after the said delivery of the writ: Averment that a convenient and reasonable time for the serving and levying the said execution in manner aforesaid had elapsed before the receipt by plaintiff of notice as hereinafter mentioned. The declaration then stated that Toms and Matthews became bankrupts, and (setting [*466] out the proceedings) that certain persons, named, were *chosen assignees, and the choice was confirmed, and they accepted the appointment; by reason of which premises, and by force of the statutes &c., they became and were and are assignees of the estate of the bankrupts, and entitled to the said goods and chattels: that the said goods and chattels were, during all the time hereinbefore in that behalf mentioned, goods and chattels of the said Toms and Matthews, and, as such, liable to be seized under the said writ; and that the same goods and chattels, not having been so seized during the time last aforesaid, passed to and became the property of the assignees by virtue of their appointment and of the statutes

(1) See now Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 45.—A. C.

&c.: That the plaintiff's judgment was adverse and not by collusion &c.: That, after delivery of the writ to defendant as sheriff, and before the issuing of the *fiat*, to wit on &c., plaintiff received notice that Toms and Matthews had committed acts of bankruptcy and had become and were bankrupts: That plaintiff had not before received notice or had knowledge of any act of bankruptcy committed by Toms or Matthews, or of their having become bankrupt: Yet defendant, not regarding his duty as such sheriff &c., but contriving &c. to deprive plaintiff of the benefit which he would have derived from the said writ being served and levied by seizure &c. before plaintiff had notice of any act of bankruptcy committed by Toms or Matthews, did not nor would, within such reasonable and convenient time as aforesaid, nor at any time before plaintiff received such notice, seize the aforesaid goods and chattels, nor serve or levy the said execution by seizure of or upon the said goods and chattels or any goods &c., but wrongfully and injuriously and in breach of his said duty in that behalf, neglected and delayed to *make such seizure until after such reasonable and convenient time as aforesaid had elapsed, and until after plaintiff had received such notice of the said acts of bankruptcy as before mentioned. Whereby plaintiff lost the benefits he would have received &c. if the writ had been served and levied &c. before he received such notice &c. and hath been prevented from obtaining satisfaction &c.

[*467]

Pleas (among others): 1. Not guilty: and 3. That a convenient and reasonable time for the serving and levying the execution as in the declaration mentioned had not elapsed before the receipt by plaintiff of the said notice, in manner and form &c.; conclusion to the country. Issues thereon.

On the trial, before Coleridge, J., at the Gloucestershire Summer Assizes, 1847, it appeared that the warrant was sent by post from London on December 2nd, 1846, to a bailiff at Newbury, who received it in due course the next morning (the delivery being between eight and nine), and went over to Hungerford (1), where the goods were, to make the levy. The sheriff never had a bound bailiff nearer to Hungerford than Newbury. According to the evidence for the plaintiff, the officer was in Hungerford about ten on the same morning, making enquiries at the office of an attorney there who was a partner of Matthews; Matthews carrying on the profession of an attorney, as well as the trade of a brewer in which

(1) Hungerford is 8½ miles from Newbury.

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he had become bankrupt. The defendant's evidence fixed the officer's arrival in Hungerford an hour later. He executed the warrant about noon (1): and the plaintiff's case was that, with proper diligence, the execution might have been effected more than an hour earlier.

[468] It appeared also that, on the same day, December 3rd, notice was given in London to Mr. Hooker, the plaintiff's attorney in the cause, that acts of bankruptcy had been committed by Toms and Matthews, upon which a docket had been struck and a *fiat* would issue. The facts as to this notice were as follows. A clerk of Mr. Hooker, the same who had lodged the *fi. fa.* with the sheriff's London agents, was in Mr. Hooker's office at ten or a few minutes after, on December 3rd, when Mr. Bishop, the attorney for the petitioning creditor, came in. The clerk told him that a warrant had gone down, to levy on the goods of Toms and Matthews. Bishop then said that a *fiat* had issued, or was about to issue, against Toms and Matthews, and desired that the clerk would mention this to Mr. Hooker (2). Hooker came to the office about eleven; and the clerk then told him what Bishop had stated. Soon afterwards a clerk of Mr. Bishop came, and gave a like notice to Mr. Hooker himself.

It was contended on behalf of the defendant that Hooker had notice of the act of bankruptcy, within stat. 2 & 3 Vict. c. 29, s. 1, from the time when Bishop made his communication to the clerk, and consequently that the levy could not, by any exertion, have been accomplished before the notice was given (3). The learned Judge thought that the information left with the clerk could not be

[*469] deemed notice to Hooker, *and, consequently, that Hooker had no notice till eleven o'clock. He left it to the jury to decide at what hours the material facts had taken place; and he told them that, although, under ordinary circumstances, an officer might not be guilty of unreasonable delay if he received a warrant in the morning and executed it in the afternoon, yet if he unnecessarily omitted the levy for only half an hour after having full opportunity to effect it, and in that interval a notice came

(1) See below, note (3).

(2) It was not disputed, on the argument in Banc, that the communication made at this time gave sufficient warning to raise the question ultimately discussed.

(3) The evidence was contradictory; but it was assumed in argument on the after mentioned rule that, even with reasonable despatch, the levy could not have been effected by ten o'clock; and that there was evidence from which the jury might infer neglect if the levy was not made by eleven.

by which the execution was defeated, the sheriff was liable: and that, if, in the present case, such a consequence had resulted from an unnecessary delay the plaintiff ought to recover. Verdict for plaintiff.

Keating, in the next Term, moved for a new trial on the ground of misdirection, contending that notice to a managing clerk of Mr. Hooker had been proved, and was, virtually, notice to himself. He also moved on affidavits. A rule *nisi* was granted.

Talfourd, Serjt. and *J. Gray* now showed cause (1):

It is true that, according to *Rothwell* v. *Timbrell* (2), if the plaintiff's attorney had notice of the acts of bankruptcy before the *fi. fa.* was actually executed, the execution was from that moment unprotected by stat. 2 & 3 Vict. c. 29 (3), s. 1; notice to the attorney being notice to the client within the meaning of the statute. The question then is, whether the information given to Hooker's clerk was notice to Hooker.

(COLERIDGE, J.: You are entitled to assume that the jury found for the plaintiff on the supposition that notice did not *reach Hooker till eleven o'clock: and you must take them to have found that before that hour the officer had an opportunity of levying.)

[*470]

That is the effect of the finding. The question, therefore, is, whether the notice at ten o'clock on December 3rd affected "the person," according to the statute, "at whose suit or on whose account" the execution issued: that is, whether it was a notice to Hooker, conclusive upon the plaintiff. The notice indicated by the statute must be one conveying actual knowledge to the person authorised to act on such notice. For this purpose the mind of the master is the mind of the client; that of the clerk is not. [They cited *Rothwell* v. *Timbrell* (4) and *Conway* v. *Nall* (5).]

(1) Before Lord Denman, Ch. J., Patteson, Coleridge and Erle, JJ.

(2) 1 Dowl. P. C. (N. S.) 778.

(3) Repealed by stat. 12 & 13 Vict. c. 106, s. 1. But see sect. 133. [12 & 13 Vict. c. 106 was repealed by the Bankruptcy Repeal and Insolvent Court Act, 1869 (32 & 33 Vict. c. 83), having been superseded by the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71). Section 133 of 12 & 13 Vict. c. 106 was replaced by ss. 94 and 95 of the Act of 1869, now superseded by ss. 45 and 49 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).—A. C.]

(4) 1 Dowl. P. C. (N. S.) 782.

(5) 1 C. B. 643, 651.

PIKE v. STEPHENS. [471]

Keating and *H. J. Hodgson*, *contrà*:

The clerk might be considered a managing clerk. There was no proof that Mr. Hooker employed any other. On the particular occasion he, and no other person, was acting in Hooker's absence. And he had before acted in the suit by lodging the writ of execution.

(COLERIDGE, J.: The mere lodging of a writ hardly brings a person within the description of a managing clerk.)

It should have been left to the jury, if material, whether he was one or not.

(COLERIDGE, J.: I do not think there was any evidence to leave. You assume that there must be a managing clerk; but this is not absolutely necessary.

ERLE, J.: What is the precise meaning of a "managing clerk?" When does an ordinary clerk become a managing clerk? If a boy is left to keep the door, does he become so when a particular notice is left with him?

LORD DENMAN, Ch. J.: It is a very simple supposition that such a person as the evidence described may represent the attorney in receiving an ordinary notice; but whether he does so for the purpose in question is a very different point.)

The efficacy of the notice, as affecting the client, cannot depend upon the degree of confidence which the attorney places in a subordinate, of whom the client knows nothing. A point of this kind arose, but was not disposed of by the Court, in *Lackington* v. *Elliott* (1). The present question, however, does not mainly depend upon the authority of the clerk. Since the decision in *Rothwell* v. *Timbrell* (2), it must be considered that notice of the bankruptcy, given to the attorney of the execution creditor, is a notice in the cause. It is *therefore like any other notice in the suit; and a delivery of it at the attorney's office, to any person attending there for the purpose of receiving notices, is a notice to the attorney. [*472]

(ERLE, J.: Then the dropping it into a letter box would at once affect the client with knowledge, though the letter might not be opened for two or three days.

(1) 66 R. R. 749 (7 Man. & G. 538). (2) 1 Dowl. P. C. (N. S.) 778.

COLERIDGE, J.: If a direction were fixed on the door, to leave papers at a wig-maker's in the neighbourhood, would leaving the notice there be a service for this purpose?)

It would, if the attorney constituted that place his place of business for the time. The operation of the notice is merely technical; for it defeats the execution, though it be delivered in London only five minutes before the levy is made in the country. There can be no middle point between holding an ordinary service at the office sufficient and requiring an actual knowledge by the attorney himself. And, in general, the practice of serving at the office is more convenient and certain than that of serving the attorney personally wherever he may be.

(PATTESON, J.: I do not see how this can be considered a mere notice in a suit. The mention of "notice" in the statute has reference not merely to executions but to dealings generally.)

This is the case of an execution: if the transaction to be invalidated had been of some other kind, such a notice might not have been sufficient. * * *

Cur. adv. vult.

LORD DENMAN, Ch. J., in the same Term (June 13th), delivered the judgment of the COURT: [473]

The point which has been argued in this case, and on which we think it right to pronounce our judgment before we go into the remaining questions, arises on the first proviso in stat. 2 & 3 Vict. c. 29, s. 1 (1).

That section enacts, "that all contracts, dealings, and transactions by and with any bankrupt really and *bonâ fide* made and entered into before the date and issuing of the *fiat* against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, *bonâ fide* executed or levied before the date and issuing of the *fiat*, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person *or persons so dealing with [*474] such bankrupt, or at whose suit or on whose account such execution or attachment shall have issued, had not at the time of such contract, dealing, or transaction, or at the time of executing or levying

(1) See *ante*, p. 519, note (3).—A. C.

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such execution or attachment, notice of any prior act of bankruptcy by him committed " (1).

Upon these words the question is, whether a notice, in other respects treated as sufficient, but served on a clerk of the plaintiff's attorney issuing the writ of execution, such clerk not being shown to have had personally the conduct of the suit, will take the execution out of the protection of the clause. The learned Judge ruled that it would not. In deciding this question it is important, of course, to consider the object of the proviso, which is in restraint of the previous enactment; and that is clearly this: whereas dealings with a trader, *bonâ fide* carried on, as executions issued out against his property, in ignorance of a prior act of bankruptcy, and prior to the date of the *fiat*, are to be protected, nothing is to be done to relieve from the ordinary operation of the bankrupt law any transaction entered into, or any execution levied, with notice of such act. And, in advancement of this, a second proviso further limits the operation of the enacting part of the section by providing that, even where there is no such notice, still, if the payment by the bankrupt be in the way of a fraudulent preference by him, or the execution be founded on a judgment or warrant of attorney or *cognovit* which he has given by way of fraudulent preference, the Act shall give no protection. On the receipt of the notice, it [*475] becomes the duty of the person properly *served to stop the transaction or execution as the case may be. This, then, being the object of the proviso, the notice must be understood to be such as will advance it; and, therefore, in the case of an execution, it has been held, rightly we think, in *Rothwell* v. *Timbrell* (2), that, although the words are " the person or persons at whose suit or on whose account " the execution issues, yet notice to the attorney who conducts the cause for him, when acting in the cause, is sufficient. It is obvious that notice to him will, in the majority of such cases, be more effectual to stop promptly the further proceeding than notice to the client himself; and it would be easy to suppose cases where the clerk of the attorney may have been so entirely entrusted with the management of the cause and the control of the proceedings that notice to him might be as effectual as to his principal, and equally bind the client: and so, in the cases of contracts, dealings and other transactions in business, instances might be put of confidential clerks or managers invested with such

(1) See stat. 12 & 13 Vict. c. 106, s. 133. [See *ante*, p. 519, note (3).]

(2) 1 Dowl. P. C. (N. S.) 778.

authority in the management of their masters' affairs, or so trusted in the particular negotiation, that a notice to them ought to stop at once the further progress of it, and therefore would bind the principal as a notice to himself. The statute in terms requires that the person dealing or suing should have notice, not that he should be personally served; and, wherever, in the transaction or the suit, he has put or allowed to be put some one else in his place to manage or controul, in good sense and equity a notice to that person must be considered a notice to himself.

This being the principle, the question is, whether such a clerk as [476] we have described from the evidence in the cause falls within it. The counsel for the defendant contended that he did: that any clerk at the office of the attorney, the place where all notices in the cause were to be served, was such clerk; nay that any other person at any other place, to whom, or at which, by notice over his door, the attorney might direct papers, letters, or notices in a cause, to be delivered, was such an agent as might receive a notice under this proviso to bind the client. But there is an obvious distinction between such a notice and those notices and matters which, in the ordinary progress of a cause, must be passing from one attorney to the other. That the cause may proceed with regularity and without delay, the Courts require that the attorney shall always be at his office, or have some competent person there during office hours for the purpose of receiving them; and, as to these, the attorney is regarded, not merely as the mere agent of the client, but rather as a substituted principal. What is required upon a notice of this kind to be done or communicated, there ought to be a clerk at the office, sufficiently skilled and instructed, to be able to do or communicate or take the necessary step upon, if the attorney himself be absent; and the client must suffer if his attorney be guilty of any default in not employing such a clerk. But the notice now in question was not a notice in the cause: it was the intervention of a third party, on the result of which would depend the perception or not of the whole fruits of the cause. It cannot be said that the clerk receiving it had authority to stay the issuing or the levying of the execution, nor that his master was bound, at all office hours, to have a clerk *there with such authority in his own absence. [*477] This was a matter which would require the whole discretion of the principal, to determine whether he would yield to it or enforce his writ; and attorneys are not bound in all cases to have in their employment clerks to whom such extensive authority may be safely

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entrusted. What has been called a managing clerk is by no means a necessary officer in an attorney's establishment. It would be very unjust to require it; and it must not be taken that even such a person would, under all circumstances, be one on whom such a notice could be effectually served.

If it be said that the doctrine now laid down may sometimes lead to injustice, and that, by the absence of the attorney from his office, it may become impossible to serve the notice in time to prevent the execution from taking effect, the answer is, that the proviso embraces other cases than that of execution, and must be construed throughout on the same principle: that, even as construed by us, the party seeking to prevent the operation of an execution has unavoidably an advantage over him who seeks to invalidate a mercantile transaction, because he has in all cases both the client and attorney, on either of whom he may serve the notice as may be most convenient: but, lastly and chiefly, that the statute is framed in advancement of the policy of modern legislation, to restrain the relation to the act of bankruptcy, and that we ought to be careful not to limit that by a notice which is in truth merely nugatory as regards the object with which it is professed to be served. The words compel us to hold that, where the notice is served on a proper person before the execution levied, it must have
[*478] effect, even where from distance it *cannot be used to stop it: but we ought not to go beyond that.

We think, therefore, that, in this case, having regard to the exact circumstances, the ruling of the learned Judge was right. And it is clear that the party serving the notice treated the clerk merely as a channel through which it was to reach the attorney, and never intended to rely on the service on him as in itself good service.

Cause was afterwards shown on the affidavits: and, in the vacation after this Term (June 26th), the rule was

Discharged.

1848.
June 8.

EX PARTE BARTLETT, CLERK.

(12 Q. B. 488—491; S. C. 18 L. J. Q. B. 11; 12 Jur. 726.)

[488] A beneficed clergyman being confined on a sentence of two years' imprisonment for misdemeanor, the Bishop of the diocese, under the Pluralities Act, 1838 (1 & 2 Vict. c. 106, s. 54), served him with a monition to reside, sequestered the living for disobedience, and, when the seques-

Ex parte BARTLETT.

tration had continued a year, was proceeding to give the patron notice, under sect. 58, that the living was void.

This Court refused, on motion by the incumbent, who continued all the time in prison, to grant a rule *nisi* for a prohibition.

BRAMWELL moved for a rule calling upon the Right Reverend Renn Dickson, Lord Bishop of Hereford, to show cause why a writ of prohibition should not issue to restrain him from proceeding, until 31st December, 1848, to give notice under his hand to the patron of the district church of St. John at Ivington, in the diocese of Hereford, of the avoidance of such benefice by reason of the non-residence of the incumbent, the Reverend Josiah Bartlett.

The following facts appeared on affidavit. On 16th November, 1846, Mr. Bartlett, being then incumbent or curate of the perpetual curacy of the district church or chapel called St. John's, in the parish of Leominster and diocese of Hereford, was sentenced by the Court of Queen's Bench to be imprisoned two years in the Queen's prison for a libel, of which he had been convicted. *That imprisonment continued till the making of the present application. On December 24th, 1846, he was served with a monition from the then Bishop, under stat. 1 & 2 Vict. c. 106, s. 54, to go into residence forthwith, and to make a return to that monition within forty days. He made a return, stating the cause of his non-residence (1), and that he intended to prosecute a writ of error. The Bishop held the return unsatisfactory, and issued his order requiring Mr. Bartlett to return into residence within thirty days. The order being served and not obeyed, a sequestration was issued, May 26th, 1847, against the benefice. The writ was served, May 27th. Mr. Bartlett appealed to the Archbishop against these proceedings; but the appeal was dismissed. The affidavit stated (on information and belief) that the now Bishop intended to give the patron notice (under sect. 58 of the statute) that the living was vacant; and it alleged further (on the like ground) that the patron was about to present another clerk. Mr. Bartlett deposed that nothing but his imprisonment had prevented him from residing.

[*489]

Bramwell contended that this was not a case within stat. 1 & 2 Vict. c. 106, s. 54, which gives the proceeding by monition and sequestration of the benefice where the spiritual person, not "having any legal cause of exemption from residence, does not sufficiently, according to the true meaning and intent of this Act, reside on such

(1) With the addition that there was no house of residence belonging to the benefice.

Ex parte BARTLETT.

benefice." This Court did not pass the sentence of imprisonment with a view to such a consequence; nor was it contemplated by the
[*490] Legislature. *If a clergyman deserves to be deprived because he has committed an offence requiring a year's imprisonment, that deprivation must be inflicted regularly, and as for an ecclesiastical offence. Setting aside, then, the question of criminality, sufficient reason is shown here for the non-residence. Sect. 58 avoids the benefice if it "continue for the space of one whole year under sequestration issued under the provisions of this Act for disobedience to the Bishop's monition or order" requiring the incumbent to reside: but there is no disobedience where it is physically impossible to obey.

(LORD DENMAN, Ch. J.: The question is, whether this be a lawful excuse for absence.)

The party "does not sufficiently" "reside;" but it is for a cause which the law makes obligatory.

(LORD DENMAN, Ch. J.: Which he has made it obligatory on the law to impose upon him.

COLERIDGE, J.: Suppose he had been transported for a crime.)

The crime might be ground of deprivation. Here the Bishop deprives, not for the offence, but incidentally to the sentence.

(COLERIDGE, J.: Suppose the clerk had given sickness as a reason for his absence, and the Bishop had refused to admit it as an excuse, and, on appeal, the Archbishop had confirmed the decision: could this Court interfere?)

The allegation of sickness would raise a simple question of fact.

(COLERIDGE, J.: Has not the Bishop jurisdiction to enquire into the cause assigned for the absence, and to determine whether or not it is such as ought to be satisfactory?)

If, in the exercise of his jurisdiction, he is wrongly construing an Act of Parliament, it is a case for interference: *Gould* v. *Gapper* (1),
[*491] *Hall* v. *Maule* (2). (*Bramwell* *also suggested that the sequestration here had not been in force for "one whole year" according to the

(1) 7 R. R. 766 (5 East, 345). (2) 7 Ad. & El. 721.

construction of the word "year" given by sect. 120, as applied in *Sharpe* v. *Bluck* (1).)

Ex parte BARTLETT.

LORD DENMAN, Ch. J.:

We certainly did not, in passing the sentence referred to, contemplate the consequence which has followed. But it seems to me that the Bishop is justified in his proceeding, because, though the clerk here is physically unable to reside, the disability results from his own misconduct. If superior authorities should deem it fit that this party should be relieved from imprisonment in order that he may again become the minister of a congregation, that is for their determination, not ours. This rule cannot be granted.

PATTESON, COLERIDGE and ERLE, JJ. concurred.

Rule refused (2).

SIMPSON *v.* ROBINSON (3).

1848. *June* 8.

(12 Q. B. 511—514; S. C. 18 L. J. Q. B. 73.)

[511]

In an action for words, constituting, *primâ facie*, a privileged communication, defendant's conduct after speaking the words (as, that he pleaded their truth in justification, and gave no evidence at the trial in support of such plea, and that he refused to admit their falsehood, although plaintiff offered, if defendant would so admit, to accept an apology and nominal damages) may be left to the jury as evidence of express malice.

So may the fact that after the speaking of the words, plaintiff, in a judicial proceeding, and in defendant's presence, gave evidence, imputing fraud to defendant in a transaction between them antecedent to the speaking of the words.

CASE, for defamatory words. Pleas, among others: Not guilty; issue thereon. Justification alleging the truth of the words; replication *de injuriâ*; issue thereon.

On the trial, before Erle, J., at the London sittings after last Easter Term, a verdict was found for the plaintiff.

O'Malley, on a former day in this Term (4), moved for a new trial. The facts of the case and the grounds of motion are fully detailed in the judgment of the COURT.

Cur. adv. vult.

(1) 10 Q. B. 280.

(2) The same motion was made in the ensuing Term to the Court of Exchequer; but the rule was refused: *In re Bartlett*, 3 EX. 28.

(3) Comm. by WILLES, J. in *Caulfield* v. *Whitworth* (1868) 18 L. T. (N. S.) 528, 16 W. R. 936.—A. C.

(4) May 30th. Before Lord Denman, Ch. J., Patteson, Coleridge and Erle, JJ.

SIMPSON v. ROBINSON.

LORD DENMAN, Ch. J. now delivered judgment:

This was a motion for a rule to set aside a verdict for the plaintiff, and for a new trial, for the reception of improper evidence, and misdirection. The action was for slanderous words, which were *primâ facie* privileged; and so a necessity arose for proving what is called express malice. This the plaintiff sought to do, by a former dispute between him and the defendant respecting a claim of 20*l.*; and, as evidence of that dispute, he proved an examination of himself before the Commissioner in insolvency in the presence [*512] *of the defendant, and upon the defendant's application to have this claim struck out of the schedule. The examination was after the time of the slander; but the plaintiff therein stated that before that time the money had been received by the defendant (1), and that the defendant had upon repeated applications for it untruly pretended that he had paid it over. The defendant was fully at liberty to answer this, and was called on to do so, but he had declined to be examined, alleging that he was apprehensive that the plaintiff's attorney was likely to take an unfair advantage of him for other purposes.

That evidence was said to be inadmissible, on the authority of a case of *Melen* v. *Andrews* (2), in which PARKE, B. declined to receive against a party proof of evidence given in his presence by a witness and not denied by him. That learned Judge thought it safer and better not to lay before the jury the defendant's conduct in not denying in a court of justice what a witness swore to the prejudice of a party present, although that party had the opportunity of cross examining the witness, of which he did not avail himself. We do not understand that case as deciding that under no circumstances can such evidence be admitted; though the learned Judge thought it in that case safer and better to exclude it, and the plaintiff's counsel acquiesced: for cases might certainly be conceived in which a party by not denying a charge so made might possibly afford [*513] strong proof that the imputation was just. But the *case does not apply. The object of the evidence in this case was not to deduce the truth of the plaintiff's statement from the defendant's not denying it, but to make it probable that the plaintiff had given such provocation, by former disputes, as might naturally be expected to excite the defendant's ill will towards him. For this purpose any thing

(1) The plaintiff entered 20*l.* in his schedule, as a debt due to him from the defendant for money received by defendant on plaintiff's account and not paid over.

(2) 31 R. R. 736 (Moo. & Mal. 336).

that showed that the plaintiff and defendant lived on bad terms may bear upon the issue of malice: and on this particular imputation the learned Judge was well warranted in asking the jury whether they inferred malice from it, and observing that such an attack on the character of an honest man, or one who wished to be thought honest, might possibly leave feelings of resentment in his mind.

Another part of the direction was said to be wrong. The plaintiff had expressed in Court his willingness to accept an apology and nominal damages, the defendant not persisting in a justification of the truth which he had pleaded; this the defendant refused; and, though he offered no evidence in support of the justification, he never withdrew the charge. On this the learned Judge remarked, with reference to the question of malice, that the whole of the defendant's conduct might be considered by the jury, and that acts although subsequent might indicate the existence of motives at a former time: and, with reference to the question of damages, he remarked that the jury should consider the nature of the imputation, how it had been made, and how it had been persisted in down to the time of the verdict, and they should calmly consider what damages would reinstate the plaintiff's character.

We see no objection to this direction. The defendant's conduct in putting a justification on the record *which he does not attempt [*514]
to prove, and will not abandon, may be taken into consideration as proving malice and aggravating the injury. And, if the defendant's conduct in that respect may at all affect the verdict, every other part of his conduct showing the same disposition may equally be laid before the jury: refusing to make reparation for unjustifiable slander may have that effect: and the malice proved to exist at the time of the trial, but connected with the subject-matter of it, may well be believed to have existed at the time of speaking the words.

My brother ROLFE lately observed at Nisi Prius on the plea of justification; and the Court of Exchequer (1) approved of his referring to it. I have seen him; and he thinks that he only made the remark to meet the defendant's argument in that case, that the words were hastily spoken. But the subsequent justification has no bearing even on that speaking except as inferring malice at that earlier time; and any conduct of the defendant at a subsequent time leading to the same inference must stand on the same footing.

Rule refused (2).

(1) See *Warwick* v. *Foulkes*, 12 M & W. 507.

(2) See *Wilson* v. *Robinson*, 68 R. R. 411 (7 Q. B. 68).

1848.
June 18.

[515]

REG. *v.* SARAH CHORLEY AND ANOTHER (1).

(12 Q. B. 515—520; S. C. 12 Jur. 822.)

Where, on the trial of an indictment for driving a carriage along, and thereby obstructing, a public footway through a narrow lane, the question was, whether the defendant's private right of carriage way, preceding the public user, and inconsistent therewith, had been released or abandoned, and the jury were directed that no interruption by the public for a less period than twenty years could destroy the private right, a new trial, for misdirection, was granted, after verdict for the defendant.

In such a case (no actual interruption for twenty years being proved), it is not so much the duration of the cesser to use the private easement, as the nature of the act done by the grantee of such easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, that is material for the consideration of the jury.

INDICTMENT for obstructing a public footway by driving horses and carts along it. Plea: Not guilty. Issue thereon.

The case was tried before Platt, B., at the Somersetshire Summer Assizes, 1846, when a verdict was found for the defendants.

Kinglake, Serjt., in Michaelmas Term, 1846, obtained a rule *nisi* to stay the judgment until the further order of the Court, in order that a fresh indictment might be preferred (2). (The facts of the case, and the direction of the learned Judge, are stated in the judgment of the COURT.) In Michaelmas vacation, 1847 (3), *Crowder*

[*516] showed *cause against the rule, and relied upon the *dictum* of LITTLEDALE, J., as to right of way, in *Moore* v. *Rawson* (4), and on *Lawrence* v. *Obee* (5), to show that there had been no misdirection. *Kinglake*, Serjt., and *Fitzherbert*, were heard in support of the rule. The judgment of the COURT makes a further report of the argument unnecessary.)

(LORD DENMAN, Ch. J.: We will inquire of my brother PLATT what was the precise direction given to the jury.)

Cur. adv. vult.

(1) Approved in *Crossley* v. *Lightowler* (1867) L. R. 2 Ch. 482, 36 L. J. Ch. 584.—A. C.

(2) He moved for a new trial: but, on the suggestion of Lord DENMAN, Ch. J. that the proper course was to move to stay the judgment, the rule *nisi* was moved for and obtained in the form stated in the text. See *Rex* v. *Sutton*, 39 R. R. 388 (5 B. & Ad. 52), and *Rex* v. *Wandsworth*, 18 R. R. 434 (1 B. & Ald. 63). The rule, as made absolute, was for a new trial. On the argument of the case, there was no discussion of the question whether the Court, after verdict for the defendants on an indictment, would grant a new trial. But see *Reg.* v. *Leigh*, 50 R. R. 463 (10 Ad. & El. 398), where this question arose (p. 469), and a new trial was granted.

(3) November 27th. Before Lord Denman, Ch. J., Coleridge and Wightman, JJ.

(4) 27 R. R. 375 (3 B. & C. 332, 339).

(5) 14 R. R. 830 (3 Camp. 514).

LORD DENMAN, Ch. J. now delivered the judgment of the COURT: REG. v. CHORLEY.

This was an indictment for obstructing a public footway by the driving of carts and horses on it: the plea was Not guilty; and the verdict passed for the defendants. A new trial was moved for on two grounds, the misdirection of the learned Judge (my brother PLATT), and the improper reception of two leases in evidence.

It appeared that the lane in question was so narrow that, when a cart or waggon passed through it, there was not room for a foot passenger on both sides, nor indeed could one pass, conveniently and without apprehension of danger, on one side. Some old witnesses spoke to the constant user of it by foot passengers, and the existence of posts at one end, with a turnstile in the centre of them, which must have effectually prevented it being at the same time used for carriages (1). *These posts and stiles, however, had disappeared for a great many years: how many, was left uncertain; by some witnesses carried back for fifty years; and there was uncertain evidence of their renewal at a later period. The defendants, however, did not dispute that there was still a public footway; nor did it appear upon the evidence that at any time the public user had been discontinued. But the defendants contended that they were entitled to a private carriage way to their premises, which were some way down the lane on one side of it, and that the public right had been acquired subsequently, and was subservient to their private right. It must be taken, we think, that the jury did not give credit to the evidence for the Crown of the very early public user before the commencement of the private user was shown; for, if that had been believed, it is obvious that no private right could have been acquired which was in derogation of it, except in some mode not pretended in the case before us; and no complaint is made that this part of the evidence was not properly submitted to the jury. But, assuming that the evidence of private user preceded the public, it is complained that the Judge misdirected the jury in telling them that nothing short of twenty years' user by the public in a way inconsistent with the private user would destroy that right; and we are to consider whether he was warranted in that direction. [*517]

We must assume that the jury have found the private right once well commenced: and, as the public footway was admitted on the

(1) It appeared that not only had there been a turnstile at one end of the lane, but at the other end the lane was too narrow to allow the entrance of carriages.

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part of the defendants, qualified only to the extent of the private right, the question in the cause really was the continuing existence
[*518] of that private right; or, to put it in other *words, whether that right, once well commenced, had been in any way released, abandoned or destroyed. The mode in which the prosecutor contended that the right must be taken to have come to an end was, by the public user and obstruction, inconsistent, as it was said, with the assertion of the private easement; and this gave occasion to the ruling which is complained of. The learned Judge appears to have told the jury that no interruption by the public for a shorter period than twenty years would destroy the right. If this were laid down as a rule of law, or even as a conclusive presumption of fact, we think in the former case it was erroneous, and in the latter would be likely to mislead the jury, as turning their attention to a definite period of time as the ground for decision, when time might in truth be wholly immaterial, or only in part material. If, on the other hand, the learned Judge had done no more than remark that, if a mere ceasing to use the private way, or a mere acquiescence in the interruption by the public were relied on, it would be prudent in them not to rely on such mere cesser or acquiescence unless shown for twenty years, we think such a remark could not have been quarrelled with, and certainly would have been no misdirection. We gather, however, from the learned Judge's report, that it was so stated to the jury that they could scarcely fail of understanding it in the former sense, as something by which they were to be definitely bound; and therefore think there ought to be a new trial.

The learned Judge appears to have proceeded on the ground, that, as twenty years' user in the absence of an express grant would have
[*519] been necessary for the acquisition *of the right, so twenty years' cesser of the use in the absence of any express release was necessary for its loss. But we apprehend that, as an express release of the easement would destroy it at any moment, so the cesser of use coupled with any act clearly indicative of an intention to abandon the right would have the same effect without any reference to time. For example, this being a right of way to the defendant's malthouse, and the mode of user by driving carts and waggons to an entrance from the lane into the malthouse yard, if the defendant had removed his malthouse, turned the premises to some other use, and walled up the entrance, and then for any considerable period of time acquiesced in the unrestrained use by the public, we conceive the easement would have been clearly gone. It is not so much the

duration of the cesser as the nature of the act done by the grantee of the easement, or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material for the consideration of the jury.

The period of time is only material as one element from which the grantee's intention to retain or abandon his easement may be inferred against him; and what period may be sufficient in any particular case must depend on all the accompanying circumstances. This is the principle on which the judgments of all the members of this Court proceeded in *Moore* v. *Rawson* (1), and which was adopted in *Liggins* v. *Inge* (2). It is true that those were cases between two individuals, and not between the public and one individual: but that can make no difference; because, assuming the defendants' to have been the prior right, theirs was the dominant tenement, the lane [*520] was the servient tenement: the owner of this last, then, could not dedicate absolutely to the public so long as it remained subject to the prior right; he could give nothing but what he himself had, a right of user not inconsistent with the defendants' easement. The question, therefore, Has the owner effectually made an absolute dedication to the public? necessarily involves this, Has the defendant released the right which he enjoyed? And, in the present case, though time would be very material, yet the nature, both of the obstruction at one end by posts, of the user by the public, and the amount of acquiescence by the defendants, were also so material, that the attention of the jury should have been pointedly drawn to them. Their conclusion might very possibly have been the same: but, in the uncertainty, we think the present verdict has not been satisfactorily arrived at.

(His Lordship then disposed of the point as to the reception of evidence. A report of the judgment on this point is deemed unnecessary.)

Rule absolute for a new trial.

(1) 27 R. R. 375 (3 B. & C. 332). (2) 33 R. R. 615 (7 Bing. 682, 693).

1848.
June 13.

[521]

WICKHAM AND OTHERS *v.* LEE.

(12 Q. B. 521—526; S. C. 18 L. J. Q. B. 21; 12 Jur. 628.)

Under the Act, 9 & 10 Vict. c. 95, for recovery of small debts, it is not a dividing of the cause of action, within sect. 63 (1), to levy one plaint for rent of premises, and another (under stat. 4 Geo. II. c. 28, s. 1) to recover double value for holding the same premises after expiration of a notice to quit.

An action for double value lies in the Courts established under stat. 9 & 10 Vict. c. 95.

A party sued in such Court for rent and double value, as above, cannot avail himself of stat. 9 & 10 Vict. c. 95, s. 58 (2), to oust the Court of jurisdiction, by alleging title to the premises in himself, if it be proved that he has admitted himself to have been tenant to the plaintiff at the times when the rent accrued, and from which the holding over commenced.

A RULE *nisi* had been obtained for a prohibition to the Judge and bailiffs of the county court of Winchester against proceeding further in certain plaints between the above named parties.

The following plaints had been heard in the county court on April 29th, 1848.

Plaint 115. The plaintiffs, in their particulars, sought to recover 19*l.* 8*s.* 4*d.* for rent for the use and occupation of a piece of land called Culver Close, in Saint Michael, Winchester, due to the testator, and to the plaintiffs as his executors, for two years, ending Michaelmas, 1846. Defendant pleaded that he was not indebted to the deceased or his estate, or to the plaintiffs as such executors, as stated in the particulars; and that the right and title of plaintiffs to any part of Culver Close was disputed by defendant, and involved a question of considerable amount, far exceeding 20*l.*, and, under sect. 58 of stat. 9 & 10 Vict. c. 95, should not be tried by the county court.

Plaint 116 was for 9*l.* 4*s.* 2*d.*, rent for use and occupation of Culver Close for one year, ending Michaelmas, 1847. Same pleas.

[522] Plaint 117 was for 9*l.* 4*s.* 2*d.*, rent of the same property for six months, ending 25th March, 1848. Same pleas.

Plaint 118. Plaint in ejectment (3), defendant, as tenant, having held over and neglected to quit. To this defendant pleaded that he was legally entitled to the whole of Culver Close (4).

By the affidavits for and against the rule it appeared that, on the trial, defendant's occupation of the premises down to that time was

(1) See now County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 81.—A. C.

(2) See now County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 56.—A. C.

(3) See stat. 9 & 10 Vict. c. 95, s. 122.

(4) There was another plaint mentioned in the affidavits, but on which nothing ultimately turned.

proved, as were also letters from the defendant to the testator and to the attorney for the plaintiffs, admitting that the defendant was tenant under the testator at a rent of 10*l.*, payable at Michaelmas, and acknowledging the testator's right to the premises. The testator died March 31st, 1846. The Judge, being satisfied that defendant had been tenant to the testator and to plaintiffs for two years ending at Michaelmas, 1847, and doubting whether, under the statute, the rent could be divided as it was by plaints 115 and 116, suggested to the attorneys for the plaintiffs and defendant that the particular of demand should be altered, so that two years' rent should be made claimable at Michaelmas, 1847, and the plaintiffs recover the whole of this under one plaint. This was agreed to: and the Judge gave judgment for the plaintiffs on the first plaint for 19*l.* 8*s.* 4*d.* (the two years' rent to Michaelmas, 1847, *minus* property tax), and ordered a nonsuit on the second plaint.

On the third plaint (117) double value was claimed for holding over after notice to quit: a holding after *such notice was proved, [*523] and the value ascertained; and judgment given for the amount.

On the fourth plaint (118) judgment was given for delivery of possession to the plaintiffs in ten days: and immediately thereupon the defendant gave notice that he should apply to a superior Court to set aside the proceedings, and undertook to enter into a bond for that purpose as required by sect. 126 (1) of stat. 9 & 10 Vict. c. 95. The amount to be secured by the bond was fixed (at 200*l.*) with consent of the Court: but no bond was ever given.

The affidavit in support of the motion stated that the defendant, during the time in question, had title under a certain lease from the Dean and Chapter of Winchester, and that he had claimed such title when the judgment was given, as before mentioned, for 19*l.* 8*s.* 4*d.* The attorney for the plaintiffs made affidavit denying the title, and alleging that no proof of it was given at the trial, though the defendant then asserted his claim, which was denied on the part of the plaintiffs.

The ground of motion was that the sums which the plaintiffs had recovered, and which had been demanded under plaints 115, 116 and 117, were in fact one claim, divided into three, contrary to sect. 63 of the statute; and that the plaints raised a question of title, over which the county court had not jurisdiction.

(1) Repealed by the County Courts Amendment Act, 1856 (18 & 19 Vict. c. 58), s. 2 and Sch. A. There is no corresponding provision in that Act or in the County Courts Act, 1888 (51 & 52 Vict. c. 43).—A. C.

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Sir J. Jervis, Attorney-General, now showed cause, and contended, as to plaints 115 and 116, that the consent of parties at the trial cured the objection: as to plaint 117, that the double value, claimed under stat. 4 Geo. II. c. 28, s. 1, was in the nature of a penalty, and did not form one ground of action with the claim
[*524] of rent; *that the defendant, having admitted himself to be tenant, could not, on those plaints, dispute the title of the landlords; and that, if the county court had improperly dealt with a question of title under plaint 118, the defendant ought to have proceeded according to sect. 126 of stat. 9 & 10 Vict. c. 95, which he had neglected to do, not having given a bond. (This point was finally conceded by the defendant's counsel; and the argument on it need not be further noticed.)

Smirke, contrà:

Stat. 9 & 10 Vict. c. 95, s. 68, enacts "That it shall not be lawful for any plaintiff" in the Courts established under this Act "to divide any cause of action for the purpose of bringing two or more suits in any of the said Courts." It was decided in the case *In re Aykroyd* (1) that any "cause of action" here means, not any single subject of contract, but any claim, though made up of several debts (within the limit there suggested), which may be the cause of a single action. Here the double value might have been recovered in one and the same action with the rent; and the demand accruing to the executors might have been claimed in the same action with that which accrued to the testator. The double value is not a penalty; for, if it were, it might be claimed as well as the rent.

(COLERIDGE, J.: The action for double value does not assume a tenancy to be subsisting.

ERLE, J.: The value recoverable is called a penalty in stat. 4 Geo. II. c. 28, s. 1.)

In an action for double value, even a tenant who has attorned to the plaintiff may dispute his title to sue: *Tingrey* v. *Brown* (2). In
[*525] *Wright* v. *Smith* (3), it seems to have been considered *that a tenant, defendant in such an action, might allege that he had held over (until ejected) under a fair claim of title. Again, it may be

(1) 1 Ex. 479.
(2) 4 R. R. 805 (1 Bos. & P. 310).
(3) 5 Esp. N. P. C. 203.

questioned whether a suit for double value lies at all in the county court: stat. 4 Geo. II. c. 28, s. 1, enacting that this demand is to be recovered "in any of his Majesty's courts of record;" which, in such enactments, usually means the superior Courts.

(ERLE, J.: The county court has, by sect. 58 (1), jurisdiction in "all pleas of personal actions, where the debt or damage claimed is not more than 20*l*." This is such a personal action.)

The clause was probably not intended to include actions of this peculiar kind. For instance, no form of procedure has been framed, under the provisions of sect. 78, for actions of detinue.

(ERLE, J.: Some one may be in fault for that; but it is no answer.)

LORD DENMAN, Ch. J.:

The consent clearly removes the first objection. The claim of double value was a different cause of action from the demand for rent: and I think the double value might be sued for in the county court under the general words of stat. 9 & 10 Vict. c. 95. As to title, the letters show that it could not be in question here.

PATTESON, J.:

The consent of parties is an answer to the first objection. As to the second, the recovery under stat. 4 Geo. II. c. 28, s. 1, is of value, not rent: the party wilfully holding over is to pay to the person kept out of possession "at the rate of double the yearly value of the lands;" "against the recovering of which said penalty there shall be no relief in equity." It is true that the double value can only be the subject of an "action of debt;" and it may be joined in such action with *a claim for use and occupation; but I [*526] do not understand the Court of Exchequer to have said that wherever two causes of action can be joined it is a splitting to separate them. It has not been effectually disputed that an action for double value may be brought in the county court. And, under the circumstances stated, no question of title could arise.

COLERIDGE, J.:

There is no doubt that debt for use and occupation and for

(1) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 56; County Courts Act, 1903 (3 Edw. VII. c. 42), s. 3.—A. C.

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double value are distinct causes of action within the statute of 9 & 10 Vict. They assume a different relation between the parties. As to the jurisdiction; this is a "personal action" within the words of the statute; and there ought to be very clear words to take it out of their operation. It is observed that detinue cannot be brought in these Courts for want of a form of process: that may require consideration when a question arises on the subject: but detinue is a peculiar action; and that may be true with regard to it which is not true of another class of actions.

ERLE, J.:

It is not a splitting of actions to bring distinct plaints where, in a superior Court, there would have been two counts. I am not sure whether the Court of Exchequer puts it so: but that is clearly the true construction of the Act. As to the last plaint: these were premises held under demise at less than the sum of 50*l.* fixed by sect. 122; the county court therefore had jurisdiction, unless the defendant enabled himself to go into the question of title under sect. 126 (1).

Rule discharged.

1848.
May 2.
June 8.

[531]

DAILS *v.* LLOYD AND PRICE.

(12 Q. B. 531—545; S. C. 17 L. J. Q. B. 247; 12 Jur. 827; 5 Rail. Cas. 572.)

Defendant, a sharebroker, bought for plaintiff, also a sharebroker, shares in the S. S. railway, and sent to him an account debiting him with only the premium, and not the deposit, though defendant had paid both. Afterwards defendant sold the same shares for plaintiff, and sent him an account crediting him with a sum made up of both premium and deposit. Plaintiff bought and sold these shares for his own principals, and debited or credited them at the prices charged as above to himself on the purchase and sale by defendant: Held, that defendant was not precluded from charging plaintiff with the deposit on the first transaction, but, upon plaintiff bringing assumpsit for a balance, might set off such deposit.

2. Defendant bought also for plaintiff shares in the T. and D. Railway, which then were only unissued scrip, so that no deposit was payable. By the custom of the market (Liverpool), the price does or does not include the deposit according as the scrip had issued or not: and the published share lists show how this is. Defendant, before the scrip issued, sent plaintiff bought and sold notes, stating the price without the deposit: but he daily sent plaintiff the share lists. After the scrip issued, defendant paid the deposit; but he still omitted, in accounts afterwards sent, to debit plaintiff with the deposit. Plaintiff had made these purchases for his own principals;

(1) See *ante*, p. 335, note (1): a county court Judge has now jurisdiction to try actions in which title is in question where neither value of the lands, &c., nor the rent payable in respect thereof exceeds 100*l.* (51 & 52 Vict. c. 43, s. 60; 3 Edw. VII. c. 42, s. 33).—A. C.

and he debited them at a price not including the deposit; but whether the contract, as between him and the principals, was a time bargain, or shares were actually delivered, did not appear: Held, that defendant was not, upon either supposition, precluded from charging for the deposit, and setting it off, as in the former case.

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ASSUMPSIT. On the trial, before Alderson, B., at the Yorkshire Spring Assizes, 1847, a verdict was taken for the plaintiff for 3,000*l.* damages, subject to the opinion of this Court on a case, to be settled by a barrister. The case was settled, substantially, as follows.

The declaration contained counts for the price of railway shares and scrip, and for money paid, money had and received, and on an account stated.

The defendants pleaded: 1. That they did not promise as alleged; 2. payment; and, 3. a set-off for work and labour, for the price of railway shares and scrip, for money lent, money paid, money had and received, and on an account stated.

The case then stated the particulars of demand, and the particulars of set-off. The latter alone are material to the point decided, which related to the following items of set-off.

[532]

		£	s.	d.	£	s.	d.
"1845.	Shares.						
"August" "30th.	30 Tean and Doves .	2	8	6	72	13 (1)	0
	Commission do. .	0	0	6	0	15	0"
"Sept." "19th.	80 South Staffordshires . .	4	10	0	360	0	0
	Commission do. .	0	1	6	6	0	0"
"But defendants paid deposit on the 80 South Stafford shares, purchased by them for plaintiff on the 19th September, amounting to . . .					200	0	0
"And defendants also paid a deposit on the 30 Tean and Doves bought by them on the 30th August, but never charged plaintiff with the deposits so paid by them, of 1*l.* 3*s.* 8*d.* (2) per share, amounting to					41	5	0"

The plaintiff was, at the period of the transactions referred to in this case, a sharebroker carrying on business at Goole, in Yorkshire; and the defendants were sharebrokers carrying on business at Liverpool.

The only question in this case is, whether the defendants can avail themselves, under the circumstances hereinafter stated, of the

(1) Apparently an error for 15*s.* (2) Apparently an error for 1*l.* 7*s.* 6*d.*

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two last items in the particular of set-off, amounting together to the sum of 241*l.* 5*s.*, either by way of deduction from the plaintiff's claim, or by way of set-off.

Various dealings in railway shares had taken place between the plaintiff and the defendants, previous to the transaction out of which these disputed items arise: and, though acting as brokers, they were responsible to each other as principals for the due performance of the contracts entered into.

First, with respect to the Tean and Dove shares.

On the 29th August, 1845, the plaintiff instructed the defendants to buy for him on the following day, at the least price which they could, 30 Tean and Dove shares. The defendants bought 30 shares
[*533] on the following *day of Messrs. Schroeder and Ashlin, at 2*l.* 8*s.* 6*d.* per share, and sent the advice note to the plaintiff, as follows.

" Bought for Mr. J. Dails, Goole.

	£	*s.*	*d.*	£	*s.*	*d.*
30 Tean and Dove Valley Railway shares -	2	8	6	72	15	0
Commission - - - -	0	0	6	0	15	0

For acct. day, 15th September.

August 30, /45.

L. AND P."

The following is a copy of the sold note from Messrs. Schroeder and Ashlin to the defendants.

" To Messrs. LLOYD AND PRICE. 30th August 1845.

" We have this day sold to you 30 shares in the Tean and Dove Railway Company, at 2*l.* 8*s.* 6*d.* per share premium.

" SCHROEDER AND ASHLIN."

On the 30th August, the scrip in the Tean and Dove Valley Railway had not issued. The price, 2*l.* 8*s.* 6*d.*, which the defendants contracted to pay Messrs. Schroeder and Ashlin, did not include the deposit: and at Liverpool it was then, and had been for some time, the usual course of business, where the scrip had not issued, and consequently the deposit had not been paid, to buy and sell at a price per share without including deposit, and, if the scrip issued and the deposit was paid previous to the account day, the deposit was added to the price. The Liverpool printed share lists had a column for the sum paid up on the shares, as well as for the prices at which they were sold: and the inspection of them would show whether the prices quoted included any deposit. The scrip issued on the 1st September; and the deposit, 1*l.* 7*s.* 6*d.* per share, was

entered *for the first time in the Liverpool lists on the 2nd September; and from that time the price per share at which the shares were sold included the deposit. The prices of Tean and Dove, quoted in the Liverpool share list of 30th August, were 2*l.* 10*s.*, 2*l.* 7*s.* 6*d.*, 2*l.* 8*s.* 6*d.*, 2*l.* 5*s.*, 2*l.* 2*s.* 6*d.* and 2*l.* [*534]

The following account of the transactions in shares between the plaintiff and the defendants, and which was rendered by the defendants to the plaintiff on the 19th September, 1845, will show what other dealings there were in these shares within the dates referred to in it.

The case then set out an account, commencing August 6th, 1845, and ending September 11th, 1845, in which the plaintiff was debited (1), on

	£	*s.*	*d.*	£	*s.*	*d.*
August 30th, for "30 Tean and Doves -	2	8	6	72	15	0
Com. of do. -	0	0	6	0	15	0"
September 3rd, for "10 Tean and Doves -	5	5	8	56	5	0
70 Do. - -	3	3	4	262	10	0
Com. do. - -	0	0	9	3	0	0"
And was credited						
On September 4th for "20 Tean and Doves	3	3	4	75	0	0"
11th "25 Tean and Doves	3	1	3	78	2	6"

And the balance shown against plaintiff was 231*l.* 13*s.* 9*d.*

The following letter was subjoined. "DEAR SIR,—We hope you will find the above correct: a remittance of money and scrip will oblige. We want 45 Tean and Dove, 20 Worcester and Crewe, and 30 Trent Continuations. Your's truly, LLOYD AND PRICE."

In addition to the price charged in the account for *the 30 Tean and Dove shares, the defendants paid Messrs. Schroeder and Ashlin the deposit, 1*l.* 7*s.* 6*d.* per share. This deposit has not been charged in account to the plaintiff at all. In the other transactions in Tean and Dove shares, mentioned in the account, all of which took place after the scrip issued, the price included the deposit. [*535]

The plaintiff, in purchasing the Tean and Doves, acted as broker for other persons; and he rendered to them advice notes of the purchases made by the defendants for him; and he charged them the same price as was mentioned in the advice note of the defendants, and as was charged by the defendants to him: and the plaintiff did not charge his principals for the shares any thing beyond the 2*l.* 8*s.* 6*d.* per share and his commission; and, upon the footing

(1) The sums are copied from the paper books, throughout the case.

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of that price, settled by payment with his principals, before the defendants made any claim upon him for the deposit. The Liverpool share lists were sent by the defendants to the plaintiff, daily, through the months of August, September and October; and, whenever there was a letter to go by the same post, the letter and the share list were sent together. The balance, 231*l.* 13*s.* 9*d.*, which appears on the above account to have been due from plaintiff to defendants, was carried forward into subsequent accounts, and entered into the account next mentioned.

On 18th September, plaintiff gave the following order by letter to defendants. "Please buy as low as you can 50 South Staffordshire for me; and, if not exceeding 5*l.*, you may buy 80." The defendants, acting upon this order, bought 80 shares and sent the following advice note.

[536]

"Bought for Mr. John Dails, Goole.

	£	s.	d.	£	s.	d.
80 South Stafford shares at -	4	10	0	360	0	0
Commission do. - - -	0	1	6	6	0	0
For account day, September 30th, E. E. -				366	0	0

"LIVERPOOL, September 19th."

Of these 80 shares, defendants bought 50 of Messrs. Forsyth and Hamilton, and 30 of Messrs. Neile: and the following are copies of the sold notes of the respective vendors.

"To Messrs. LLOYD AND PRICE. SIRS,—We have this day sold to you 50 shares in the South Staffordshire Railway, at 4*l.* 10*s.* per share, nett prem. And remain, Yours truly, FORSYTH AND HAMILTON."

"Paid £ *nil.*

"Prem. 4*l.* 10*s.*"

"To Messrs. LLOYD AND PRICE. We have this day sold to you thirty shares in the South Staffordshire Railway, at 4½*l.* per share; namely, prem. 4*l.* 10*s.* We remain, Your's respectfully, FRAS. AND JAS. NEILE."

The scrip in the South Staffordshire shares began to be issued, on the 18th September, 1845, at Walsall. During the first three days the issue was to the allottees at Walsall, and the neighbourhood. The original deposit was 1*l.* 7*s.* 6*d.* per share: but, in compliance with the standing orders of the House of Lords, the deposit was, by a resolution of the provisional committee, passed on 22nd September, 1845, increased to 2*l.* 10*s.* per share, the shares

being 25*l.* shares. The first deposit of 1*l.* 7*s.* 6*d.* per share on the letters of allotment of the South Stafford shares, purchased by defendants for plaintiff, had been paid on 14th August, 1845; and the second deposit on 18th and 19th September in that year. The price, 4*l.* 10*s.*, at which defendants contracted *to buy, did not [*537] include the deposit or any part thereof. The prices quoted in the Liverpool shares list of 19th September were 4*l.* 10*s.* and 4*l.* 15*s.* In settling with the vendors for the shares, after the scrip had issued, defendants paid them 2*l.* 10*s.*, in addition to the above sum of 4*l.* 10*s.* per share.

On the 26th September, defendants received instructions from plaintiff to sell 80 South Staffords; and they sold them on that day at 7*l.* per share, and sent the following advice note.

"Sold for John Dails, Goole.

	£	s.	d.	£	s.	d.
80 South Stafford Railway shares at -	7	0	0	560	0	0
Commission on do. - - - -	0	2	6	10	0	0
E. E.				550	0	0

For account day October 15th.

LIVERPOOL, September 26th, 1845."

On 2nd October, defendants forwarded the plaintiff the following account of transactions between them up to the 30th September.

The case set out the account, beginning at September 15th, 1845; in which account plaintiff was debited as follows.

	£	s.	d.	£	s.	d.
"September 19th, 80 South Stafford -	4	10	0	360	0	0
Commission do. -	0	1	6	6	0	0"

And the balance against the plaintiff was 141*l.* 2*s.*

This account, it will be observed, contains the purchase only, and not the sale, of the 80 South Staffords (the sale being for a subsequent account); and the price charged is 4*l.* 10*s.* per share.

On 13th October, defendants forwarded the plaintiff the following account of transactions between them up to that date.

The case set out the account, beginning at 26th September, 1845, [538] and crediting plaintiff as follows.

	£	s.	d.	£	s.	d.
"Sept. 26th. To 80 Staffords -	7	0	0	560	0	0"

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And the balance in favour of the plaintiff was 941*l.* 16*s.* 6*d.*

In this account, the selling price charged for the South Staffords includes the deposit of 2*l.* 10*s.*

On 31st October, defendants forwarded the plaintiff the following account of transactions between them up to that date.

John Dails, Esq., Goole, in account current with Lloyd and Price, Liverpool.

1845.		s.	d.	£	s.	d.	1845.		£	s.	d.	£	s.	d.
Oct. 17.	Cash - -	-		855	7	8	Oct. 13.	Balance Acct. rendered -	-	-		941	16	6
13.	Comm. Goole and Donc. -	2	6	5	0	0		40 Goole and Donc. -	7	5	8	305	0	0
Balance	- -	-		386	8	10								
				1,246	16	6						1,246	16	6
							Oct. 27.	Balance -	-	-		386	8	10

The plaintiff has not been charged in account at all with any thing beyond the 4*l.* 10*s.* per share for the South Staffordshire shares.

The plaintiff, in buying and selling the South Staffordshire shares, acted as broker for other parties; and he rendered advice notes to them, and settled by payment with them upon the footing of the advice notes sent to him by the defendants, treating the purchase price charged in these notes as the full price of the shares. The settlement by payment was before the defendants made any claim upon the plaintiff in respect of the deposit upon these shares. The Liverpool share lists contained no entry in the column for money paid on account of South Staffordshire [*539] *until the 26th September, when the 2*l.* 10*s.* per share was entered for the first time as paid.

The defendants omitted by mistake, in the accounts rendered by them to the plaintiff, and which are hereinbefore set forth, to make any reference to the deposit paid by them on the Tean and Dove shares, and also on the South Staffordshire shares, in addition to the price stated in the advice notes sent to the plaintiff.

On 18th November, the plaintiff addressed to the defendants a letter of which the following is an extract: "I beg to annex your account current, showing a balance in my favour of 605*l.* 14*s.* 10*d.*, of which amount I must beg the favour of a remittance by return of post."

On receipt of this letter, defendants examined their books, and first discovered their mistake with regard to the deposits.

On 19th November, defendants addressed the plaintiff a letter of

which the following is an extract: "We are in the receipt of your's of yesterday annexing statement of your account, which is not complete. According to your statement we stand D^r. for 605*l.* 14*s.* 10*d.* But, on September 19th, we paid deposit on 80 South Staffordshires, amounting to - £ 200 *s.* 0 *d.* 0

And then, on August (1), 1830, we purchased for you 30 Tean and Doves at 2*l.* 8*s.* 6*d.* p^m. But never charged you the deposit of 1*l.* 3*s.* 8*d.* per share, amounting to - - - - - - - - - 41 5 0

£ *s.* *d.*
241 5 0

Which leaves a balance of - - - - £364 9 10

[*540] "according to our statement, which is correct. We enclose sundries, as at foot, for 364*l.* 9*s.* 10*d.*, to square this account, and which please acknowledge."

On 20th November, plaintiff addressed to defendants a letter of which the following is an extract: "I have your's of yesterday's date, accompanying cash &c., value together 364*l.* 9*s.* 10*d.*, which amount is passed to your credit. The claims you make for South Staffords and Tean and Doves shall be laid before the parties concerned, two of whom are from home at present: but I really cannot allow you thus summarily to make the deductions from our present settlement for other transactions. I do therefore hope you will see the justice of immediately remitting the balance of 241*l.* 5*s.* still remaining due to me."

On 21st November, defendants addressed the plaintiff the following letter: "Your's is to hand. As regards the deposits charged on the South Staffords and Tean and Doves, it is only what we have paid when the shares were taken up: and so you will at once see the justice of it. When you look at our position, you will not think we do wrong in not sending you the money. We purchased prior to the scrip being issued; and consequently the deposit was not in the lists: this your client will see on reference to the list, and will not hesitate to settling with you."

On 22nd November, plaintiff addressed the defendants a letter from which the following is an extract: "If, therefore, I do not, on or before Wednesday next, receive from you the balance of 241*l.* 5*s.*, remaining due to me, I shall at once place the matter in the hands of my solicitor; and must decline any further communication with

(1) *Sic.*

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you, except through him. At foot *I give you the names of the purchasers of the South Staffordshire and Tean and Dove shares, [*541] in (1) your government; as, unless I am first put in possession of the balance owing me, I must decline any further interference in the matter."

The names and descriptions were given at the foot.

The question for the opinion of the Court is, whether the defendants can avail themselves, in this action, in any form, of the deposits on the Tean and Dove and South Staffordshire shares, amounting together to the sum of 241*l.* 5*s.*, paid by them to the persons from whom they bought those shares, in addition to the prices charged by them in their advice notes and in the accounts sent to the plaintiff. If they can avail themselves of that sum, then the plaintiff has been fully paid his demand; and the verdict will be entered for the defendants on the 2nd and 3rd issues: if they cannot avail themselves, then the verdict will be entered for the plaintiff on all the issues, and be for the sum of 241*l.* 5*s.*

The case was argued in last Term (2).

Baines, for the plaintiff, contended that, the plaintiff having settled with his own principals on terms which had been fixed according to the representation of the defendants, the loss must fall on the defendants, as having been guilty of the first *laches*: *Skyring* v. *Greenwood* (3), *Marriot* v. *Hampton* (4), *Bramston* v. [*542] *Robins (5), *Shaw* v. *Picton* (6), *Shaw* v. *Dartnall* (7): that, although a party may correct a mistake which has not affected the position of another, *Thomas* v. *Hawkes* (8), *Cox* v. *Prentice* (9), *Heane* v. *Rogers* (10), yet it is otherwise where such other party has been prejudiced by acting on a mistaken representation: *Sheffield and Manchester Railway Company* v. *Woodcock* (11), *Pickard* v. *Sears* (12), *Gregg* v. *Wells* (13).

Cowling, contrà, contended that the plaintiff, being himself a broker, could not but have known, from a comparison of the prices

(1) *Sic.*

(2) May 2nd, 1848. Before Lord Denman, Ch. J., Patteson, Wightman and Erle, JJ.

(3) 4 B. & C. 281.

(4) 4 R. R. 439 (7 T. R. 269; *S. C.* 2 Sm. L. C. 237).

(5) 29 R. R. 493 (4 Bing. 11).

(6) 28 R. R. 445 (4 B. & C. 715, 724).

(7) 30 R. R. 246 (6 B. & C. 56).

(8) 58 R. R. 648 (8 M. & W. 140).

(9) 16 R. R. 288 (3 M. & S. 344).

(10) 9 B. & C. 577.

(11) 56 R. R. 788 (7 M. & W. 574, 583).

(12) 45 R. R. 538 (6 Ad. & El. 469).

(13) 50 R. R. 347 (10 Ad. & El. 90).

with the share lists, that no deposit had been charged to him, and that it had been paid by the defendants: that the effect of a sale, and the liability to the deposit, with reference to the account day, was well understood among brokers, and must be assumed to have been within the plaintiff's knowledge: *Fletcher* v. *Marshall* (1); that the deposit paid by the defendants was money paid for the use of the plaintiff: *Sutton* v. *Tatham* (2), *Bayliffe* v. *Butterworth* (3): and that the right of action had not been waived: *Willoughby* v. *Backhouse* (4).

Cur. adv. vult.

LORD DENMAN, Ch. J., in this Term (June 8th), delivered the judgment of the COURT:

The only question in this case was, whether the *defendants were [*543] entitled to set off a sum of 200*l.*, paid by them for deposit on eighty shares in the South Stafford Railway, purchased by them for the plaintiff, and a further sum of 41*l.* 5*s.*, paid by the defendants for deposit on thirty shares in the Tean and Dove Railway, purchased by them for the plaintiff.

Upon looking at the accounts between the parties, as stated in the case, it seems to us to be clear that the defendants are entitled to set off the 200*l.* paid by them for deposit upon the eighty shares in the South Stafford Railway, as the plaintiff has actually had the full benefit of that payment allowed to him in account, though the defendants have, by mistake, omitted to charge him with it on the debit side of the account. In the account, sent by the defendants to the plaintiff, of the 2nd October, 1845, they charge him with 360*l.* as the purchase money for the eighty South Stafford shares at 4*l.* 10*s.* a share, omitting to charge him with 2*l.* 10*s.* per share more, which they had paid for deposit: but, in the subsequent account of the 13th October, 1845, they give him credit for 560*l.*, as the produce of the same shares, which they sold for the plaintiff at 7*l.* a share, which included the 2*l.* 10*s.* per share paid by them for deposit beyond the premium of 4*l.* 10*s.* per share. There is, therefore, no reasonable ground for contending that the defendants are not entitled to set off that 200*l.*

The right to set off the 41*l.* 5*s.*, on account of the Tean and Dove shares, is not quite so clear. Those shares were purchased by the defendants for the plaintiff, on the 30th of August, 1845, at 2*l.* 8*s.* 6*d.*

(1) 71 R. R. 827 (15 M. & W. 755, 763).
(2) 50 R. R. 312 (10 Ad. & El. 27).
(3) 74 R. R. 702 (1 Ex. 425).
(4) 26 R. R. 566 (2 B. & C. 821).

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per share; and the bought note was sent to the plaintiff with that sum as the price. The 2*l.* 8*s.* 6*d.* was only the premium *per share,
[*544] no deposit being then paid, as the scrip was not issued. The shares were bought for the plaintiff for the account day, which was the 15th of September, and, by the custom of share brokers, if the deposit was paid before the account day, it was added to the price. The plaintiff was a share broker, but dealt with the defendants as a principal; and the fact of his being himself a broker is no otherwise important than as showing that he would be cognizant of the course of dealing in the share market with respect to the payment of deposits upon shares.

As the scrip of the Tean and Dove shares had not come out on the 30th of August, when the purchase was made, it must have been clear to the plaintiff that the deposit had not been paid at that time, and consequently was not included in the price of 2*l.* 8*s.* 6*d.* per share. In the ordinary course of business, the payment made by the defendants on account of the deposit would not appear as a charge against the plaintiff until the 19th September, when the first account was rendered. It is not, however, charged to the plaintiff in that account, nor in any other, owing to a mistake. And the question is, whether the defendants are concluded by that omission from charging the plaintiff with the payment of the deposit as an item of set-off, because he has himself sold to other persons at the price paid for premium only, and has, at that rate, been paid and settled with by those persons.

The precise nature of the dealing between the plaintiff and his principals does not appear upon the case; nor is it stated that the scrip was ever transferred by the plaintiff: for all that appears, it may have been a mere time bargain, and the scrip may still be in
[*545] the *hands of the plaintiff. If the scrip was actually transferred by the plaintiff, he must have known, or ought to have known, that the price he paid was premium merely, and could not have included any sum paid for deposit. In either view of the case, we think that the defendants are entitled to set off the amount which by the course of business they were bound to pay in order to procure the scrip, beyond the premium, and that the omission to debit the plaintiff with such payment in their account does not take away their right. They dealt with the plaintiff as the principal in the transaction, and are not concluded by having, by mistake, omitted to charge him with a payment of which he has had the benefit by the actual possession of the scrip, which could only have been obtained by the

payment in question. The case of *Sutton* v. *Tatham* (1), as well as the other cases cited in the argument, are consistent with the view we take of the case: and our judgment therefore is in favour of the defendants.

DAILS v. LLOYD.

Judgment for defendants.

BOWERS *v.* NIXON.

1848. *Nov.* 27.

(12 Q. B. 558, *n.*—562, *n.*; S. C. 18 L. J. Q. B. 35.)

[THIS case, reported in 12 Q. B. merely as a note to another case of *Bowers* v. *Nixon* (not retained in the Revised Reports, the point being technical and obsolete) will be reprinted from the better report in 18 L. J. Q. B. 35.]

IN THE MATTER OF ARBITRATION BETWEEN BRADSHAW AND THE EAST AND WEST INDIA DOCKS, &c.

1848. *May* 4. *June* 2.

(12 Q. B. 562—576; S. C. 17 L. J. Q. B. 362; 12 Jur. 998.)

[562]

Under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18, if a question of disputed compensation be submitted to arbitration, under ss. 23, 25, and an umpire be appointed, under sect. 28, by the Board of Trade (or Railway Commissioners, since stat. 9 & 10 Vict. c. 105), and the submission be made a rule of Court (2) under sect. 36, the Court has jurisdiction to set aside the award of the umpire, though neither the appointment of the umpire, nor his award, be made a rule of Court.

It is no objection, under sect. 63, to the award of such umpire, made under sect. 28, that the price of the land and the compensation for damage by severance, though each is expressly claimed, are assessed in a gross sum.

A claimant in respect of land of which he is tenant in fee cannot object that the award assesses the compensation on the assumption that he is in possession, whereas it is occupied by a lessee.

The Court will not entertain the objection that the award is contrary to the evidence.

A Company, under sect. 25, appointed an arbitrator on 23rd March; the claimant another on 6th April. The arbitrators neglected, seven days after request by the Company, to appoint an umpire; on which the Company applied to the Railway Commissioners; and they appointed an umpire on 17th May. Held that such appointment was in time.

The umpire and arbitrators made their declarations, under sect. 33, on 27th May, before the umpire entered upon the matters referred: Held, that no objection arose from the lateness of these declarations.

The umpire made his award on 23rd July: Held, not too late, he having three months for that purpose, under sect. 23, from the time of the duty devolving on him (3).

THE following facts were stated by the affidavit on which the after mentioned rule *nisi* was obtained.

(1) 50 R. R. 312 (10 Ad. & El. 27).

(2) See now Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 1 and 24.—A. C.

(3) Followed on this point in *Re Pullen* and *The Corporation of Liverpool* (1882) 51 L. J. Q. B. 288.—A. C.

BRADSHAW'S ARBITRATION.

1846. November 30. The above named Company (acting under stat. 9 & 10 Vict. c. cccxcvi., local and personal, public) sent a notice, of this date, to William Bradshaw, who was possessed of the fee simple of a house, buildings and land in Middlesex, stating that they were willing to treat for his estate and interest in the land and premises described in the notice. At the foot thereof was the following description of the premises required.

[563] "Parish of St. John, South Hackney, in the County of Middlesex."

"No. on Plan.	Description of Property.	Owner or reputed Owner.	Lessee.	Occupier.
1.	Pasture - - -	William Bradshaw -	- - -	John Low.
3.	Ditto - - -	Ditto - - -	- - -	Ditto.
4.	Ditto - - -	Ditto - - -	- - -	Ditto.
8.	Farm house, yard and cow sheds -	Ditto - - -	- - -	Ditto.
9.	House, yard, garden and outbuilding -	Ditto - - -	John Baum	John Baum.
10.	Stable, outbuildings and yard - -	Ditto - - -	Ditto -	Ditto."

This schedule properly described the interest of Bradshaw's tenants.

December 21. Bradshaw made his claim on the Company, stating that, "by reason of the construction of the said railway, about ten acres of my estate will be wholly destroyed for building purposes. I therefore claim for the land described in the notice of the 30th of November, being a portion of such ten acres, and for injury and damage to the residue of such ten acres by reason of the intended severance, the sum of 17,325*l.*, subject to a fair deduction therefrom for the value of the land destroyed for building purposes and which may not be required or taken by the Company. I also claim, as the value of the manor house, garden and outbuildings described by the No. 9 in such notice, and in the occupation of John Baum, the sum of 1,500*l.*; and for the stabling, outbuildings and yard, described by the No. 10, the sum of 750*l.* And also claim to be paid for any injury or damage I may otherwise sustain, and all costs, charges and expenses to be incurred by me, by reason of the said Company taking such land and premises. And, in
[*564] addition, compensation *for being dispossessed of my estate." He added: "And I, the said W. B., do hereby give express notice to the promoters of" &c., "that it is my intention to claim, and I do hereby claim, the benefit of the 23rd section of the Lands Clauses

Consolidation Act" (8 & 9 Vict. c. 18); "and I do hereby signify my desire to have this my claim settled by arbitration, in manner as by the said Act is provided for settling claims by arbitration." A copy was delivered to the solicitor of the Company on the same day.

1847. March 25th. Bradshaw's solicitor received from the Company's solicitor notice, dated 23rd March, that they had appointed Francis Fuller arbitrator on their part; requesting Bradshaw to appoint an arbitrator on his behalf; and adding a description of the land required, exactly like the description before set out.

April 6th. Bradshaw appointed Henry Francis Gadsden arbitrator on his part, by written notice to the promoters; which recited the notices of 30th November and 21st December, 1846, and added: "and I hereby give notice that the matter so required to be referred to arbitration is as follows: viz. to settle the amount of compensation to be paid to me by the said Company for the fee simple in possession of and in the land, farm house, yard and cow shed in the occupation of John Low; the manor house, garden and outbuildings, the stabling, outbuildings and yard, in the occupation of John Baum (which said manor house, garden and outbuildings, stabling, outbuildings and yard, are subject to a lease thereof granted to the said John Baum for a term of years which will expire on Michaelmas Day, 1850, at the yearly rent of 38*l.*); all which said premises are described or referred to in my aforesaid *claim; and for injury and damage by reason of the severance of my said land; and for all other injury, damage, costs, charges and expenses mentioned and detailed in my claim hereinbefore recited."

[*565]

Afterwards Bradshaw, the arbitrators not having appointed an umpire, applied to the Board of Trade to appoint one, requesting that he might be a barrister.

May 17. The Board appointed George Powell, who was chief clerk to the Waterloo Bridge Company, and not a barrister.

May 27. The arbitrators and Powell made the declarations prescribed by stat. 8 & 9 Vict. s. 33.

The affidavit then detailed circumstances for the purpose of showing that the umpire had received evidence not on oath, and had decided contrary to the evidence; and it stated that proof was given of the damages by taking the land, and the general damages by severance, subject to the lessee's and tenants' interest.

BRADSHAW'S ARBITRATION.

July 26. The claimant's solicitor received a copy of the award hereafter described. It was deposed that the claimant had never alleged that he held the estate in possession free from incumbrances, or could give immediate possession, but that he gave express notice of Baum's lease and Low's tenancy.

The submission (entered into by appointment of arbitrators as above mentioned) was made a rule of Court on 12th November, 1847 (1). The award was dated 23rd July, 1847. It stated that the umpire, "having also, in making this my award, regarded not only the value of the lands, hereditaments and premises to be purchased [*566] *or taken as aforesaid by the said Company from the said William Bradshaw, but also the damage and detriment to be sustained by him by reason of the severing of the said lands, hereditaments and premises taken from the other lands, hereditaments and premises of the said William Bradshaw, or otherwise injuriously affecting such other lands, hereditaments and premises by the exercise by the said Company of the powers contained in the said Acts" (the Acts relating to the Company) "or either of them," did "award, decide, order and determine that the amount or sum of money to be paid by the said Company to the said W. B., his heirs, executors," &c., as and for and by way of compensation and consideration money for the absolute purchase of the fee simple in possession, free from incumbrances (save and except the tithe commutation rent-charge), of all those pieces or parcels of land, hereditaments and premises, so agreed to be purchased as aforesaid, and particularly mentioned and described in the said schedule hereunder written, and numbered, respectively, 1, 3, 4, 8, 9 and 10, on the said plan hereunto annexed, and coloured" &c., "and also for the purchase of all and every the estate, right, share and interest of him, the said W. B., and his heirs, executors," &c., "in, upon or affecting the said lands, hereditaments and premises, or any part thereof, and also for the immediate possession thereof, and also as and for compensation for all damage sustained by the said W. B. by reason of the severing of the said lands," &c., "hereinbefore described from the other lands," &c., "of the said W. B., or otherwise injuriously affecting such other lands," &c., "shall be the sum of 2,560*l.* of lawful money of Great Britain, the same being, in my

(1) Stat. 8 & 9 Vict. c. 18, s. 36. The rule directed "that the two several appointments of arbitrators or submissions to arbitration," executed by the parties respectively, should "be respectively entered and made a rule of this Court."

judgment, the fair, just and reasonable value of the said lands, hereditaments and premises." *(The schedule annexed contained the parcels mentioned in the description, *ante*, p. 350, without names of parties, but stating the quantities, in all, two acres and fourteen perches.) [*567]

Butt, on behalf of the claimant, in last Michaelmas Term, obtained a rule, on reading the rule of Court of November, 1847, the affidavits, and the copy of the award, calling on the Company to show cause "why the award or umpirage made between the parties should not be set aside on the following grounds: That the award is not warranted by the submission: the price to be paid for the land for compensation for the damage by severance, and for the other injuries sustained by the claimant, is assessed in one sum of 2560*l*., whereas the sum to be paid for the land, the sum to be paid as compensation for severance, and the sum to be paid for other injuries, should each have been assessed and awarded separately: That the award is not according to, nor warranted by, the claim upon which the umpire professes to adjudicate, in this, that the umpire has awarded a sum for the value of the land, and for the immediate possession thereof, whereas it appears, by the claim and the proceedings, that the claimant had not possession, and could not give such immediate possession, but that part of the land to be taken by the Company was in the possession and occupation of John Baum, under a lease to him for a term of years expiring in 1850, and that other part of the land so to be taken was in the occupation of John Low, as tenant thereof: That the umpire has exceeded his authority in awarding a sum of money to be paid (*inter alia*) for the immediate possession of the said land; that he had no power to award in respect of such immediate *possession: That the [*568] umpire received evidence and statements not upon oath: That he decided contrary to all the evidence before him: That the declarations of the arbitrators and umpire, respectively, were not made in due time: That the umpire was not properly and legally appointed: That the award was made after the umpire's authority had ceased: That the award is not certain nor final in the several particulars before mentioned: That the Board of Trade had no authority to appoint an umpire."

In the affidavit in answer it was deposed that the book of reference was made in haste, and under circumstances which rendered it impossible to rely upon it for accuracy in detail. That Gadsden,

BRADSHAW'S ARBITRATION.

the claimant's arbitrator, had, by the direction of the claimant's solicitor, refused to agree to the appointment of any umpire not of the legal profession: that thereupon the Company's solicitor applied to the Railway Commissioners (1) to appoint; and the latter appointed Powell. That the claimant's solicitor then objected that seven days' notice had not been given to the arbitrators; and thereupon, on 30th April, 1847, such notice, on behalf of the Company, was given to the arbitrators, requesting them to appoint an umpire. That, they not having done so, application was made on the 8th of May to the Railway Commissioners, who, on the 17th of May, reappointed Powell.

The affidavit then went into statements contradicting or explaining the statements on the other side as to the umpire's conduct, and the evidence.

That, upon the hearing, no lease or agreement for tenancy with
[*569] Baum or Low was shown; but the claim *was made on the assumption that the land was practically in the claimant's power for building purposes; and that the claimant's notice, in which he stated his interest to be "fee simple in possession," was put in evidence.

That no objection was made by the claimant's solicitor to the appointment of the umpire; and that such solicitor appeared to concur in the proceedings.

In last Term (2),

Sir John Jervis, Attorney-General, *Sir F. Kelly*, and *Cowling* showed cause:

The Court has no jurisdiction over the award. It has not been made a rule of Court, neither has the appointment of the umpire, but only the submission, under stat. 8 & 9 Vict. c. 18, s. 36. It is true that the submission is the ultimate origin of the umpire's authority.

(WIGHTMAN, J.: The effect therefore is the same as if his appointment had been made a rule of Court.)

As to the first objection. Nothing in the Act requires an umpire to assess the price in a distinct sum from the compensation for

(1) Stat. 9 & 10 Vict. c. 105 (Royal assent, 28th August, 1846), s. 2, transfers the powers of the Board of Trade to the Railway Commissioners.

(2) May 4th, 1848. Before Lord Denman, Ch. J., Patteson, Wightman and Erle, JJ.

damage by severance. Sect. 63 directs only that, in estimating the purchase money or compensation, regard shall be had to both; sect. 34 speaks only of a single sum. Sect. 49 does indeed direct a separate assessment in the case of a jury: but even there the provision is directory only, not compulsory: *Corrigal* v. *The London and Blackwall Railway Company* (1), where the COURT relied upon the case *In the Matter of the London and Greenwich Railway Company* (2).

As to the second and third objections. The claimant will be a gainer by the mistake, if there be one, as he has compensation for both the reversion and the possession. [570]

As to the fourth objection. The claimant's affidavit is loose as to the facts, and is answered.

As to the fifth objection. The claimant's affidavit does not distinctly raise the point. But, if this were otherwise, the Court would not entertain such an objection to an award.

As to the sixth objection. It was not necessary that the arbitrators should make any declaration under sect. 33. They did not (according to the words of that clause) "enter into the consideration of any matters referred:" their character of arbitrators existed only to the extent of giving, by their neglect, authority to the Railway Commissioners under sect. 28. They could not properly act at all before they appointed an umpire: *Hughes* v. *Garnett* (3). The umpire did in fact make the declaration before entering upon the matters referred.

As to the eighth objection. This rests merely on the grounds before discussed.

As to the seventh and ninth objections. The arbitrators did not, under sect. 27, appoint an umpire; nor, in fact, did they do any thing within the twenty-one days, named in sect. 31, from the appointment of the last arbitrator. That, however, would not prevent the Commissioners from appointing an umpire; for it could not prevent the arbitrators themselves from doing so: if it did, the question must be left to a jury, who could not, under sect. 23, act for three months; and that interval would be unemployed altogether. But the umpire's *power originates in sect. 28. There was nothing to prevent the Company from making the request to appoint an umpire, at any time before the period arrived at which a jury could act: otherwise, it would always be necessary to make the request [*571]

(1) 3 Man. & G. 219, 249.
(2) 2 Ad. & El. 678.
(3) Cited in *Reade* v. *Dutton*, 46 R. R. 504 (2 M. & W. 69).

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within fourteen days of the appointment of the last arbitrator, so as to leave seven days to complete the twenty-one named in sect. 28. Nor does the Act limit the power of the Commissioners to the twenty-one days. Further, the claimant has waived the objection by appearing before the umpire: and therefore, whatever might be the decision of the Court if it were attempted to enforce the award, the claimant is not entitled to ask to have it set aside, as void; the distinction between setting aside an award and refusing to enforce it is illustrated by *Doe* d. *Turnbull* v. *Brown* (1) and *Cock* v. *Gent* (2). Then, if the umpire was duly appointed, the only limitation as to the time for making the award must be under sect. 23. But he cannot be said to have failed for three months to make his award till three months have expired from his acquiring the authority (3): *Skerratt* v. *North Staffordshire Railway Company* (4).

Butt and *Hugh Hill*, *contrà*:

None of the objections is answered. As to the second and third. The complaint of the claimant is, not that he gets less than the
[*572] umpire would have awarded if he had taken the lease into *consideration, but that the award is made on a subject-matter not submitted to arbitration at all, namely, the value of the fee simple in possession.

As to the fourth objection. (On this they discussed the affidavits.)

As to the seventh and ninth objections. The power of the arbitrators to appoint an umpire ceased at the end of twenty-one days from the appointment of the last arbitrator; and the power of the Commissioners is merely substituted for that of the arbitrators. The power of the umpire to make an award by himself is given only in the two cases of the arbitrators differing, or neglecting to award: sects. 28, 31: he must therefore be appointed before their functions expire. According to the argument on the other side, there is no limitation at all as to the time during which the Commissioners may appoint. Consent cannot give jurisdiction.

Cur. adv. vult.

(1) 29 R. R. 275 (5 B. & C. 384).

(2) 13 M. & W. 364.

(3) *Hugh Hill*, on this point, referred to an unreported case, *In the Matter of the Great North of England Railway*, argued before Patteson, J. in the Bail Court, by *Martin* and *H. Hill* on one side, and *Bliss* on the other, in last Michaelmas Term. His Lordship now stated, from his notes, that the decision there was, that the time ran from the appointment of the umpire, and not, as urged in support of the award, from the time of his appointment coming to his knowledge.

(4) 2 Ph. 475.

LORD DENMAN, Ch. J., in this Term (June 2nd), delivered the judgment of the COURT: BRADSHAW'S ARBITRATION.

In this case, several objections were made against the award of the umpire.

First: that one sum was awarded for damage and price, instead of a separate sum on each account. The answer is that, in respect of arbitration, there is no requirement in the statute for separate assessments, and that, in respect of verdicts upon inquisitions, such requirements as are in sect. 49 of the present statute are directory, and not conditional: *In the Matter of the London and Greenwich Railway Company* (1), *Corrigal* v. *The London and Blackwall Railway Company* (2).

Secondly and thirdly: that the award assumes the claimant to be in possession. The answer is, that such assumption, if actually made, is in his favour and to his advantage, and therefore no matter of complaint for him. But it does not appear clearly that any such assumption was made. The expression "fee simple in possession," [573]

(1) 2 Ad. & El. 678.

(2) 5 Man. & G. 219, [where the other points decided depended upon the construction of provisions peculiar to the special Acts (6 & 7 Will. IV. c. cxxiii.; 2 & 3 Vict. c. xcv.), the following is the portion of the judgment of TINDAL, Ch. J., which deals with the point in question (at pp. 248, 249): "The objection is then raised that, by the twenty-second section of the former statute, it is expressly provided that the jury shall assess and give a verdict for the sum to be paid for the purchase of the lands, and also the sum of money to be paid by way of satisfaction, recompense or compensation for goodwill &c., 'and also that the satisfaction, recompense or compensation for such damage or loss shall be enquired into and assessed separately and distinctly from the value of the lands so to be taken or used as aforesaid.' The question therefore is whether the words just adverted to are compulsory, and in the nature of a condition, so that if they are not observed, the inquisition and subsequent judgment are to be held void, or whether they are directory only, so that the Company or the claimant might have called upon the sheriff to keep the evidence distinct as to the value of the premises, and the satisfaction for damage, and to find and adjudicate a separate sum in respect of each. And we think those words directory only. There are no expressions in the statute, which require them to be construed as words of condition or which show such intention on the part of the Legislature, and they are not to be construed to avoid the proceedings, unless such appears to be the necessary construction. And the Court of Queen's Bench in the case of *In re the London and Greenwich Railway Company*,† which arose upon a precisely similar clause of another statute, considered these words to be directory only, and that the Company could not treat the verdict as a nullity, it being the duty of the Company to have called upon the jury at the time to make a separate assessment of the value and damages, which they had not done." The practice is now well settled.—A. C.].

† 2 Ad. & El. 678.

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in the claim, is used in contradistinction to fee simple in the reversion or remainder. The compensation given can only be taken to be in respect of what was claimed: and, if the tenants have any claim in respect of the actual possession of the land, their remedy is against the Company, and not against the owner of the fee.

Fourthly, fifthly and eighthly: that the umpire received statements not on oath, and that he decided contrary to the evidence, and that the award is not final. But the proof of these assertions fails: and, with respect to the fifth objection, even if the decision had been contrary to the evidence, that would not be any ground for the interference of this Court.

As to the ninth, sixth and seventh objections against the appointment of an umpire by the Board of Trade, the time of his declaration, and the time of making his award: the facts appear to be, that the Company appointed their arbitrator on the 23rd March, 1847, and the claimant his on the 6th April. These arbitrators did not appoint an umpire, or enter on the matters referred; and both parties, before the 29th April, joined in applying to the Board of Trade to appoint an umpire. On the 29th April the claimant objected to the appointment of any umpire not a barrister. The Company afterwards made a request to the arbitrators: and, after seven days, another application [*574] *to the Board of Trade, who, on the 17th May, appointed a surveyor to be the umpire. He made his declaration on 27th May, and his award on 26th July. Upon these facts the objections are that the appointment of the umpire must be completed within twenty-one days, and the award of the umpire made within three months, after the appointment of the arbitrators; that their appointment was complete on the 6th April, and that, consequently, the appointment of the umpire on the 17th May, and the making of the award on the 26th of July, were too late. But it appears to us that the powers given for arbitration continue for three months after the arbitrators are appointed, and are determined then only by sect. 23, enacting that the question shall be settled by a jury if, when the matter shall have been referred to arbitration, the arbitrators or their umpire shall for three months have failed to make their or his award, or if no final award shall be made: That the 31st section, providing that the umpire shall determine, where neither of the arbitrators refuses or neglects to act and they fail for twenty-one days from their appointment to make their award, operates only to take from the arbitrators the power of making an award, and to vest that power in the umpire, but not to render void the submission to

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arbitration and the other powers incidental thereto, such as the appointment of an umpire. The statute contemplates three cases where a single arbitrator is to award; and in each of those cases he has three months for the purpose: viz. where a single arbitrator is originally appointed, under sect. 25, or a vacancy is left unsupplied, under sect. 26, or one of the two refuses or neglects to act, under sect. 30. It is to be observed *that the umpire cannot be brought [*575] into action in either of these cases. Then section 31 provides for two arbitrators acting and failing to award. If they so fail for twenty-one days, and do not extend their time, the power to award is taken from them and vested in such umpire as is duly appointed under the other provisions of the statute, which are not affected by this section. The incapacity to make an award has no effect upon the power given to the arbitrators under sect. 27, and to the Board of Trade, on their default, under sect. 28, to appoint a new umpire in case of the death or failure of the first. And we see no reason why the same incapacity to award should have any effect upon the powers given for appointing the original umpire. If the construction contended for by the claimant is correct, it might happen that at the end of twenty-one days the power to award might cease, and the power to resort to a jury still be suspended for the residue of three months; which would be a delay without purpose. On these grounds we have come to the conclusion that the appointment of the umpire was valid.

There appears no foundation for the objection that the umpire did not make his declaration in time, as he was appointed on the 17th May, and made it on the 27th, before he entered on the matters referred.

The remaining objection is that the award of the umpire is too late, there being more than three months between the appointment of the arbitrators and his award. But we find it decided, in *Skerratt* v. *North Staffordshire Railway Company* (1), that the three *months for the umpire commences from the duty devolving upon [*576] him. In this decision we fully concur. And, as this award of the umpire was made within three months from the duty devolving upon him, and indeed within three months from his appointment, it is not too late.

The rule therefore must be discharged with costs.

Rule discharged.

(1) 2 Ph. 475.

1848.
April 28.
June 2.

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(12 Q. B. 576—603; S. C. 17 L. J. Q. B. 233; 12 Jur. 848.)

The owner of a coal mine excavated as far as the boundary (which he was by custom entitled to do), and continued the excavation wrongfully into the neighbouring mine, leaving an aperture in the coal of that mine, through which water passed into it and did damage.

Held that the party excavating was liable in trespass for breaking into the neighbouring mine, but not in an action on the case for omitting to close up the aperture on his neighbour's soil; though a continuing damage resulted from its being unclosed. And therefore that, on an issue joined upon Not guilty, the facts being proved as above stated, the defendant was entitled to the verdict.

Quære, whether, under such circumstances, a legal obligation attaches on the trespasser to use means on his own land for preventing the flow of water.

But, if it does, and an action is brought for not using such means, the declaration must allege the duty specifically; and the plaintiff cannot recover on a count stating merely that the defendant wrongfully made the aperture and omitted for an unreasonable time to close it, whereby &c.

Nor can he recover at all for damage occasioned by the flow of water in consequence of the aperture remaining unclosed, if an action on the case has already been brought for making the aperture and letting in the water, which action was referred to arbitration, and the plaintiff, being made party to the reference in respect of any injury to him by any of the matters alleged in the declaration in such action, has had damages awarded and paid to him for such injury: Although the damage last complained of is subsequent to the award and payment.

CASE. The declaration stated: That defendant, at the time of the committing &c., was possessed of and entitled to a certain coal mine lying and being under certain land in the county of Lancaster, and contiguous and next adjoining to a certain other coal mine in the said county formerly in the possession and occupation of one James Starkey, but at the time of the committing &c., and now, in the possession and occupation of the plaintiffs under a demise
[*577] heretofore to *them thereof made by the said James Starkey: And that, while the last mentioned coal mine was in the possession and occupation of the said J. S., to wit on 31st December, 1838, the defendant broke and entered the said last mentioned coal mine, and dug out of the same divers large quantities of coal, to wit &c., and took and carried away the same, and thereby then made and caused a large, wide and extensive aperture and excavation into the said last mentioned coal mine from the said coal mine of the defendant: And, although defendant, after plaintiffs became possessed of the said coal mine &c., to wit on 1st August, 1841, was requested by plaintiffs to fill and stop up the said aperture and excavation so made by defendant as aforesaid, yet defendant, well knowing &c.,

but contriving &c., to wit on 8th August, 1841, and on divers other days &c., and while the said coal mine was in the possession and occupation of plaintiffs as aforesaid, wrongfully and injuriously kept and continued, and caused to be kept and continued, for a long and unreasonable time, to wit thence hitherto, the said aperture and excavation open and unfilled up, and, during all the time aforesaid, has neglected and refused, and still neglects and refuses, to fill and close up the same: Whereby, and by reason of the continuing and keeping by the defendant the said aperture and excavation so open and unfilled up as aforesaid, divers large quantities of water which had gathered and collected, and were then standing, in the said coal mine of defendant next immediately adjoining to the said coal mine in the possession and occupation of plaintiffs, afterwards and after plaintiffs became possessed of the said last mentioned coal mine, to wit on the day and year last aforesaid, *burst through, [*578] and then ran and flowed from and out of, the said coal mine of the said defendant through the said aperture and excavation, in and upon, into and over the said coal mine then in the possession and occupation of plaintiffs, and inundated and greatly damaged and injured the same; and the said large quantities of water have, thence hitherto, run and flowed, and still continue to run and flow, from and out of the said coal mine of defendant, through the said aperture and excavation, in, upon, into and over the said coal mine in the possession and occupation of plaintiffs as aforesaid: Whereby, and by reason of the said large quantities of water inundating &c., and still continuing to run &c.; damage, that plaintiffs and their servants have been hindered from working the mine &c., and plaintiffs have been forced to expend, and have expended, money, to wit &c., in pumping out the water and putting the mine into a fit state for working &c.

Pleas. 1. Not guilty. Issue thereon. 2. That the causes of action did not accrue within six years. Verification. Replication, that the causes of action did accrue within &c.: conclusion to the country. Issue thereon. 3. That the mine secondly above mentioned was not, at the time of the committing &c., in the possession or occupation of plaintiffs, in manner &c.: conclusion to the country. Issue thereon. 4. That defendant was not requested by plaintiffs to fill and stop up the said aperture &c., in manner &c.: conclusion to the country. Issue thereon.

5. That, heretofore, to wit on 16th February, A.D. 1841, one Hugh Hornby, clerk, in the Court &c. (Exchequer), impleaded

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defendant in an action of trespass on the case, and therein declared
[*579] that, before and at *the time of the committing of the grievances thereinafter mentioned, one James Starkey held and enjoyed a certain close &c. called The Holmes &c., and a certain other close &c., parcel of the bed of the river Roach, &c., as tenant to the said Hugh Hornby, the reversion thereof in his demesne as of fee &c. then belonging to and vesting in the said H. H.; and that defendant did, whilst the said J. S. held &c., as tenant &c. as aforesaid, and whilst the said reversion thereof belonged to and was vested in H. H., to wit on 1st January, A.D. 1820, and on divers other &c., wrongfully and unjustly, without the leave &c., and against the will, of H. H., break and enter into the said closes &c., and then made divers to wit 100 holes and 100 excavations in the strata and mines by and in the said closes, under the surface thereof, and then dug and excavated divers to wit 100,000 tons of coal and 100,000 cart loads of earth and soil from and out of the said closes in, under and below the surface thereof, and then carried away the same, and thereby caused divers, to wit two, acres of the roofs and earth, soil and coal and land of the said two closes, immediately above, about and around the said holes and excavations, to fall in, upon, about and in the said closes, and then and thereby choked up, damaged and spoiled divers to wit 500,000 tons of coal and 500,000 tons of earth and soil of and in the said closes, and thereby caused divers drains and water courses and quantities of water to empty themselves, run, escape and flow unto and into the said two closes under and below the surface, flooding, injuring and spoiling the coal, strata, earth and soil of the said two closes in, under and beneath the surface thereof, and thereby also then injured the said closes,
[*580] and greatly *thereby also then weakened and undermined and rendered insecure the surfaces of the said closes and permanently injured the reversionary estate and interest of the said Hugh Hornby of and in the said two closes and the mines &c.; by reason of which &c. (averring damage to Hornby's reversionary estate): That defendant pleaded Not guilty and other pleas, and issues were thereupon joined: and such proceedings were thereupon had that afterwards &c.: the plea then alleged that Hornby's action came on for trial at the Liverpool August Assizes, 5 Vict.; and thereupon, by a rule then made at the said Assizes with the consent of Hornby and defendant, &c., and of Starkey, who thereby consented to become a party to the rule, it was ordered that the jury should find a verdict for Hornby, damages 10,000*l.*, subject to be reduced &c.

or a verdict for defendant, or a nonsuit, entered, according to the award after mentioned; and that the cause, and all matters in difference between Hornby and defendant, and between Starkey and defendant, should be referred to the award &c. (reference, in ordinary form, to a barrister): and that the persons composing a joint partnership or mining Company, called the Heywood Colliery Company, or the Captain Fold Colliery, might, if they should think fit, and certify their desire by writing &c., become parties to the rule, as to any alleged injury to them or any of them by any of the matters alleged in the declaration. The plea then averred that the persons composing the said partnership, who are the now plaintiffs in this suit, certified their desire accordingly: that the arbitrator took upon him the arbitration, and made and published his award, and thereby ordered the damages to be reduced to *436*l.* 19*s.* 3*d.*, [*581] and awarded that Starkey had sustained damages by the matters in the said declaration alleged, and assessed such damages at 1*s.*, and further awarded that the said persons composing the said partnership had suffered damages in respect of certain injuries to them by the matters in the said declaration alleged, to the amount of 204*l.* 8*s.*: and he awarded that that sum should be paid to them, and the sum of 1*s.* to Starkey, by the defendant, on or before &c. The plea averred that defendant did pay the several sums to the respective parties, as awarded, and that they accepted and received the same after the making of the award; and it averred, also, the identity of the last mentioned James Starkey with the Starkey mentioned in the present declaration, and of the Heywood Colliery Company with the plaintiffs in this suit: and it alleged that the coal mine in the present declaration secondly mentioned was and is parcel of the two closes mentioned in Hornby's declaration, and of the coal strata &c. of the said two closes so flooded &c. as therein mentioned: "and that the said breaking and entering the said coal mine in the said declaration of the now plaintiffs mentioned, and digging out of the same the said quantities of coal therein mentioned, and taking and carrying away the same, and making and causing the said aperture and excavation into the said last mentioned coal mine from the said coal mine of the defendant, were and are part and parcel of the grievances in the said declaration in the said action of the said Hugh Hornby, and in the said award" "mentioned, and in respect whereof such damages were awarded and paid as aforesaid to the said Hugh Hornby, James Starkey, and the said persons composing the said Company *and the now plaintiffs, [*582]

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respectively, and were so awarded and paid as aforesaid for and in respect of such damages as aforesaid, and all consequential damages to arise or happen in consequence thereof to the said H. H., J. S., and the said Company and now plaintiffs, respectively, or any persons thereinafter claiming any interest under them, or any of them respectively. And this" &c. Verification.

Replication to plea 5. That plaintiffs commenced their action, "not for the grievances in that plea attempted to be justified, but for that the defendant, after the commencement of the said action" at the suit of H. H., and after the making of the said award, "to wit on the day and year in the said declaration mentioned, and from the making of the said award thence hitherto, kept and continued the said aperture and excavation, so made by the defendant into the said coal mine of the plaintiffs below the surface of the earth as in the declaration mentioned, opened and unfilled up and unclosed, and, after the making of the said award and thence hitherto, wrongfully suffered and permitted the said large quantities of water which had gathered and collected, and were then standing, in the said coal mine of the defendant as in the said declaration mentioned, to run and flow through the said aperture and excavation so made by the defendant as aforesaid in, upon, into and over the said coal mine of the plaintiffs, and to flood and inundate the same, and which, but for the making of the said aperture and excavation by the defendant as aforesaid, and digging out and carrying away the said quantities of coal therefrom, and keeping and continuing the same by the defendant thence hitherto open, unfilled up and unclosed, would not *have so run and flowed as aforesaid and flooded and inundated the said coal mine of the plaintiffs. And that, by reason of the premises, and of the defendant neglecting to divert and otherwise drain off or dispose of the said large quantities of water which had so collected and accumulated in his said coal mine as aforesaid, so as to prevent the same from flowing through the said aperture and excavation so made by the defendant as aforesaid, and thus flooding and inundating the said coal mine of the plaintiffs, the said large quantities of water have, from the time of the making of the said award, and thence hitherto, continued to run and flow, and at the time of the commencement of this suit still ran and flowed, and still do run and flow, from and out of the said coal mine of the defendant in, upon, into and over the said coal mine in the possession and occupation of the plaintiffs as aforesaid, in manner and form as the

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plaintiffs have in their said declaration above complained against the defendant; being other and different grievances than those in the said last plea of the defendant attempted to be justified." Verification.

Pleas to the new assignment. 1. Not guilty. Issue thereon. 2. That Hornby impleaded defendant in such action as in the last plea to the present declaration mentioned, and such proceedings were had thereon, and the cause and all matters &c. were so referred, and such persons became parties &c., and such award was made and damages awarded and paid by defendant to the respective parties, as in that plea mentioned, and that the persons to whom the damages were paid were respectively such persons as in that plea in that behalf alleged. And "that the said *damages were so [*584] awarded and so paid as aforesaid for and in respect of the matters in the declaration in the said action at the suit of the said H. H. alleged, and the injuries to the said persons in the said award mentioned by the matters in the said declaration in the said action at the suit of the said H. H. alleged, and for and in respect of all consequential damages thereafter to arise or happen by reason of any of the matters or injuries in the said declaration in that cause alleged to any of the said parties to the said reference other than the said defendant, and all persons thereafter claiming any interest under them, or any of them respectively. And the defendant further says that, though true it is that the grievances above newly assigned were grievances arising or happening after the commencement of the said action at the suit of the said H. H., and after the making of the said award, yet that the said grievances so newly assigned, and each and every of them, were and are merely and only consequential damages arising or happening to the plaintiffs by reason of the matters or injuries in the said declaration in the said cause at the suit of the said H. H. alleged, and the matters in difference and injuries so referred as aforesaid, and in respect of which such damages were so awarded and paid as aforesaid." Verification.

Replication to the last plea to the new assignment. That the award in that plea mentioned was in the words &c. following: the replication then set it forth as it is, in substance, stated above, p. 363 (1), and proceeded: *Without this, that the said grievances [*585]

(1) The words of the award as to the damages sustained by Starkey and the now plaintiffs were stated as follows: "And I do further award, order and adjudge that the said James Starkey hath sustained damage by the matters

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so above newly assigned were merely and only consequential damages arising or happening to the plaintiffs by reason of the matters or injuries in the said declaration in the said cause at the suit of the said H. H. alleged, and the matters in difference and injuries so referred as aforesaid, or any or either of them, or any part, or in respect of which the said damages were so awarded and paid as aforesaid, in manner and form as in the said last plea is alleged. Conclusion to the country. Issue thereon.

The present cause was tried at the Liverpool Spring Assizes, 1845, when a special verdict was found.

The verdict stated that the plaintiffs were owners of a colliery called the Captain Fold Colliery, from 1830 to the commencement of this suit. That, in 1839, James Starkey, by indenture, demised to the plaintiffs all the mines and beds of coal &c. lying within or under the tenement and estate and demised lands of Starkey, called the Heywood Hall estate, for 99 years. That the Heywood Hall estate comprised the lands from the west end of a tunnel at Captain Fold (shown in a plan annexed), north-west, to the defendant's colliery on the opposite side of the river Roach, and included that river and part of certain lands called the Holmes (shown in the plan), and comprised the drawing road and water *level from the said tunnel to the Holmes (also shown in the plan). The verdict then went on as follows.

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That, before the making of the said lease to the plaintiffs by James Starkey, the defendant had, by his servants, trespassed into that part of the Heywood Hall estate leased to the plaintiffs which adjoined the defendant's mine, (and marked or shown on the said plan &c.), "and got the coal, there marked" &c., "out of the Heywood Hall estate, and, in getting that coal, had made an aperture and excavation into the coal of the Heywood Hall estate at the place marked A. at the north-west end of the water level before mentioned (in the said plan marked" &c.), "which was so leased by the said J. S. to the plaintiffs: that, afterwards and before the year 1839, the roof of the said excavation made by the defendant into the Heywood Hall coal fell in by reason of his having

in the said declaration alleged; and I assess such damage at the amount of one shilling: And I do further award, order and determine that the persons composing the said joint partnership or Mining Company, called the Heywood Colliery Company, have suffered damage in respect of certain injury to them by the matters in the said declaration in the said cause alleged; and I assess such damage at the amount of 204*l.* 8*s.*" Then followed the order for payment.

got the coal and removed the pillars there; and the interstice became filled with water: that, afterwards, in 1840, the plaintiffs drove a level from the said tunnel into and along the Heywood Hall estate coal, as shown" &c. (in the plan) "in a direction towards the defendant's mine, and until they came to a point, A., being at a distance of from six to ten yards short of, and within, their own boundary, when the waters which had collected in the defendant's mine flowed through the excavation and aperture at A. aforesaid, which had been made in the Heywood Hall estate as aforesaid; and the defendant has not hitherto stopped or filled up the aperture, or done any thing to prevent the flowing of the water from his mine through and into the said aperture and excavation made by him in the Heywood Hall estate: Neither the plaintiffs nor the said James Starkey, nor the said Hugh Hornby, clerk, had any knowledge of the *trespass so as aforesaid committed by the said defendant, or [*587] of the aperture and excavation so made as aforesaid, or of the said roof having so fallen in and the interstice having so become filled with water, until the plaintiffs, in driving their said level, met the excavated workings of the defendant at the said point A. That the defendant has not pumped any water out of his mine adjoining the Heywood Hall estate since 1840, and has ceased to work his own mine since 1842. That plaintiffs' and defendant's mines are on the same bed of coal, the defendant's on the rise, and the plaintiffs' on the dip; and that it is the custom in working coal mines for the owner of the mine or bed on the rise to work up to the boundary of his coal on the dip, and for the owner of the mine or bed on the dip to protect his own mine from the influx of water from the mine or bed on the rise by leaving a sufficient barrier of coal on his own side of the boundary on the rise; and that the said distance of from six to ten yards, left by the plaintiffs beyond the end of their water level aforesaid, would have been a sufficient barrier for the purpose aforesaid, if the defendant had not by his said servants made the aperture and excavation aforesaid. That the water, after the plaintiffs so drove the said water level, continued to flow from the defendant's colliery into the said water level at the place marked A., through the said aperture and excavation, and thence ran along the water level to the said tunnel, and flooded the coal at Captain Fold Colliery, between the said drawing road and water level; which said continued flowing of the water through the said aperture and excavation so made by the defendant as mentioned in the declaration in the action brought by H. H., clerk, as hereinafter

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[*588]

mentioned, and the continued *running thereof along the water level and flooding the coal as aforesaid, are the grievances complained of in this action. That, in consequence thereof, the plaintiffs, in order to win and get the said coal of the Heywood Hall estate, have, ever since, up to the time of the commencement of this action, been obliged to pump out and discharge, and have pumped out and discharged, the said water so flooding the coal at Captain Fold Colliery along the said tunnel, and thereby have incurred considerable expenses in pumping the water out of the said last mentioned colliery, beyond what they theretofore had incurred; and which said expenses are sought to be recovered in this action."

The verdict then stated that, on 16th February, 1841, Hornby brought his action; and proceedings thereon took place, as mentioned in the 5th plea to the present declaration. That, before and at the time of the committing of the grievances mentioned in Hornby's declaration, Hornby was seised of the closes therein mentioned, and Starkey tenant thereof, as in that declaration mentioned, Hornby being mortgagee, and Starkey his mortgagor in possession: and that the said closes respectively formed part and parcel of the Heywood Hall estate; and that the plaintiffs' coal mine mentioned in the within declaration is underneath the surface of the closes mentioned in the declaration in the action brought by H. H., and parcel of the same, and of the coal strata mentioned in that declaration. The verdict further stated that the proceedings as to the reference took place, and the award was made, and the damages paid to the parties respectively, as in the fifth plea mentioned: And that the coal mine in the present declaration secondly

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mentioned *was, at the time of the committing of the grievances therein complained of, to wit from 8th August, 1841, until the commencement of this suit, in the possession and occupation of the plaintiffs as alleged by them on the present record.

The verdict then submitted, in the usual form, the questions: Whether or not, upon the whole matter, the defendant is guilty of the grievances above laid to his charge, as in the declaration and new assignment specified; Whether or not the causes of action or any of them accrued within six years next &c.; and Whether the grievances newly assigned "were or were not merely and only consequential damages arising or happening to the plaintiffs by reason of the matters or injuries in the said declaration in the said cause at the suit of the said H. H. alleged, and the matters in difference

and injury so referred as aforesaid, or any or either of them, or any part thereof, or in respect of which such damages were so awarded and paid as aforesaid " (1).

The special verdict was argued in Easter Term, 1848 (2).

Hoggins, for the plaintiffs:

As to the first issue. The substance of the complaint is, that the defendant dug into the plaintiffs' soil and thereby made an aperture, which not being stopped, the waters running from the defendant's mine flow into that of the plaintiffs. The question is, not whether the grievances legitimately result from the premises as stated in the declaration, but whether, as stated, they are not such as the plaintiffs *may obtain a verdict for on a plea of Not guilty. On the [*590] issue, as joined, the finding must be for the plaintiffs, even if the consequence should be a motion in arrest of judgment.

(WIGHTMAN, J.: The aperture is on the plaintiffs' land: how could the defendant fill it up without being liable to an action of trespass?

PATTESON, J.: If a man breaks my windows so that the rain enters, can I have an action against him for not coming in and mending them?

LORD DENMAN, Ch. J.: Did the defendant, by his first trespass, give himself the privilege of entering upon the plaintiffs' land?)

The last case bearing directly on this subject is *Firmstone* v. *Wheeley* (3): where the declaration, in case, alleged that the plaintiffs and defendants had adjoining coal mines, that the defendants had trespassed on the plaintiffs' mine, and dug large quantities of coals therefrom; that afterwards water had flowed into defendants' mine, which would necessarily inundate that of plaintiffs unless a sufficient barrier were provided; that defendants, by their trespasses, had removed that which would have been a sufficient barrier and the only one, and, they having done so, it became their duty to provide, and take means, for preventing the water collected in defendants' mine from flooding the mine of the plaintiffs; and the breach was that the defendants neglected to make any provision, and by reason thereof water ran from their mine into the plaintiffs'.

(1) As to the issue on plaintiffs' request to defendant, there was no express finding or question.

(2) April 28th. Before Lord Denman, Ch. J., Patteson, Wightman and Erle, JJ.

(3) 13 L. J. Ex. 361. Trin. T. 1844.

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On demurrer, the Court of Exchequer seems to have thought the breach well laid (1): and ALDERSON, B. said: "If the defendants alter the *plaintiffs' barrier, it may become their duty to take care that the plaintiffs sustain no injury from the alteration. Suppose you have water upon your land, and by not taking proper precautions, it flows upon my land, are you not liable? A man makes a hole in the wall of his neighbour's house, may he afterwards fill a reservoir, and let the water flow in upon that house?"

[*591]

(PATTESON, J.: The party who has to prevent the injury must use the means within his own land. You allege here that the defendants were bound to fill the aperture on your land.)

The injury is not alleged as resulting merely from the omission to do that: the words are "whereby, and by reason of the continuing" &c. of the said aperture, &c. The new assignment states that the defendant wrongfully permitted water which had collected in his mine to run into the mine of the plaintiffs.

(WIGHTMAN, J.: The new assignment cannot suggest a different cause of action from that stated in the declaration.)

Even if the defendant would be a trespasser in repairing, he is liable for the original grievance.

(WIGHTMAN, J.: But your complaint, as stated, is of his not doing what he has no right to do.)

The difficulty thrown upon him is the consequence of his own act.

(WIGHTMAN, J.: At any rate you do not charge it so.

PATTESON, J.: How can you say there is a continuing in this case. Your claim is as if a man broke another's leg, and an action were brought against him for not setting it.)

In *Thompson* v. *Gibson* (2) the defendants had erected a building which obstructed a market; and they were held liable for continuing the nuisance, though they had no right *of entry upon the land where the building stood.

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(1) Leave was given to withdraw the demurrer on the usual terms, unless the plaintiffs thought fit to amend the declaration, in which case there were to be no costs on either side.

(2) 56 R. R. 762 (7 M. & W. 456).

(WIGHTMAN, J.: There the complaint was that they had not removed something which they had placed on the land.)

This case is the same in principle. It does not rest with the defendant to say that he would have been a trespasser in closing the aperture. The plaintiffs might have consented.

(PATTESON, J.: The principle as to works above and works under ground is the same; and there is no instance of a recovery, first for breaking down a wall, and then for not rebuilding it.)

In *Booth* v. *Oliver* (1) (cited in *Hudson* v. *Nicholson* (2)) it is said that, in an action on the case, if the plaintiff declares that the defendant threw down and prostrated a wall which divided the plaintiff's and defendant's houses, and also pulled away the tiles of plaintiff's house, *per quod* the water comes into plaintiff's house and rots the timber thereof, the action lies, for, although he might have an action of trespass for pulling off the tiles, yet this action lies also, inasmuch as it is alleged that, by reason thereof, the timber of the house was rotted. In *Westbourne* v. *Mordant* (3), where the declaration, in case, alleged that the defendant put stones into a brook, and thereby stopped the water, so that it overflowed the plaintiff's meadow, it was objected that the nuisance, by throwing in the stones, was laid before the plaintiff's title commenced; but the COURT held that the nuisance might not be till the water ran over, and that the action was well brought.

(PATTESON, J.: In *Hudson* v. *Nicholson* (2) the declaration was held to be in trespass, though informal. The case in Rolle was not a case of *continuing. [*593]

ERLE, J.: It is consistent with that authority that there might be an option only.

WIGHTMAN, J.: Your complaint is, not of a continuing, but of a neglecting to fill up: that is the charge; the rest is gravamen. It is as if the complaint, in the case from Rolle, had been that the defendant did not replace the tiles.

PATTESON, J.: How can a man be said to continue that which he cannot prevent from continuing?

(1) 1 Roll. Abr. 104, tit. Action sur case (K), pl. 3.

(2) 5 M. & W. 437, 441.

(3) Cro. Eliz. 191.

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LORD DENMAN, Ch. J.: The plaintiffs allege that they licensed the defendant by their request; and, that being so, they may suggest that he was chargeable with continuing, independently of the authority of *Thompson* v. *Gibson* (1). The plaintiffs, however, might have done what, as they say, ought to have been done by the defendant, and charged the expense to him.

(*Martin*, for the defendant, observed that the request was traversed on the record, and not affirmed by the verdict.

If the verdict is imperfect, the plaintiffs are willing that the cause should be re-tried, to settle the undecided question. But, on the whole case, a request sufficiently appears.

(WIGHTMAN, J.: What evidence is there of it?)

The bringing of the action.

(WIGHTMAN, J.: That does not prove a request as averred. If there is no evidence of it, we might, perhaps, consider the verdict as amended according to the fact, and nothing will then turn on the request (2).)

[*594] The question *on the Statute of Limitations is substantially the same as the question on the first issue. As to the issues upon the new assignment, trespass might have lain for the act which originally caused the injury; but, if there is a resulting damage long subsequent, case lies for that: *Roberts* v. *Read* (3) *Gillon* v. *Boddington* (4); otherwise there would be no compensation for that injury: and in fact none was given by the award.

Martin, contrà:

The plaintiffs can maintain no action for the injury here alleged: or, if they can, their right of action has already been satisfied by the proceedings on the arbitration. The declaration in Hornby's

(1) 56 R. R. 762 (7 M. & W. 456).

(2) It appears that judgment was given on the supposition that there was to be a verdict for the defendant on the fourth plea, and for the plaintiffs on the second and third (see *post*, p. 377). No amendment, however, was ultimately agreed to. Error, on the judgment in this Court, was afterwards brought in the Exchequer Chamber, when the difficulty was pointed out from the Bench, and it was said that there ought to be an amendment of the verdict, or a *venire de novo*. Finally, no judgment was given in the Exchequer Chamber, the parties agreeing that proceedings should be stayed, that the plaintiffs should give a release to defendant, and that no costs should be paid on either side.

(3) 14 R. R. 335 (16 East, 215).

(4) 29 R. R. 243 (Ry. & M. 161).

action necessarily embraced both the present and the future permanent injury. That action, and all matters in difference between Hornby and the defendant, and Starkey and the defendant, were referred to arbitration, with liberty to the now plaintiffs to become parties to the rule of reference as to any alleged injury to them by any of the matters stated in the then declaration. They did become parties; and damages were awarded and paid. The question then is, whether the defendant was bound afterwards to go upon the plaintiffs' land and fill up the aperture. The plaintiffs assume that; the defendant denies it; and, not acknowledging any other default or misfeasance, he pleads Not guilty. It results from all the cases (nor does the *judgment of POLLOCK, C. B. in *Firmstone* v. *Wheeley* (1) go any farther) that, where a man does on his own land something which, for want of prevention on his part, becomes injurious to the land of another, he is liable to an action: but no case shows that if the original injurious act has been done on another's land the doer of it is bound to make good the injury upon that land or else abide the ultimate consequences. *Gillon* v. *Boddington* (2) (explained in *Howell* v. *Young* (3), by HOLROYD, J., who referred to *Fetter* v. *Beale* (4)) is consistent with all the authorities if it be understood that the injurious act of excavation was done upon the land of the Dock Company themselves, and that they were held liable as for a nuisance continued on their own premises, and finally producing injury to the plaintiff, for which he then sued. If otherwise understood, *Gillon* v. *Boddington* (2) is not law, nor borne out by *Roberts* v. *Read* (5). There the cause of injury was a digging, not on the plaintiff's soil, but in the soil of the street; no action could have lain till a specific injury to the plaintiff resulted from that act, which injury was the falling of the wall. In *Hodsoll* v. *Stallebrass* (6), where it was held that damages might be given for a bodily injury to the plaintiff's servant, in respect of future disability, LITTLEDALE, J. said: "It is argued that a fresh action might be brought from time to time; but that is not so, the action being founded, not upon the damage only, but upon the unlawful act, and the damage. Without the special damage this action would not be maintainable *at the plaintiff's suit. A fresh action could not be brought unless there were both a new unlawful act and

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(1) 13 L. J. Ex. 361.
(2) 29 R. R. 243 (Ry. & M. 161).
(3) 29 R. R. 237 (5 B. & C. 259, 267, 268).
(4) 1 Salk. 11.
(5) 14 R. R. 335 (16 East, 215).
(6) 52 R. R. 350 (11 Ad. & El. 301, 305).

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fresh damage." In *Thompson* v. *Gibson* (1) it was perhaps inaccurately argued that the defendants were not liable because they would be guilty of a trespass in removing the nuisance from the land of the third party on which it had been erected: but PARKE, B., in answering the argument, clearly addresses himself to the case of a positive nuisance, which, if it continue, may be abated by the party injured. *Booth* v. *Oliver* (2) was cited, in *Hudson* v. *Nicholson* (3), to show that case might be brought for the injury on the plaintiff's land; and so it might on the facts there shown, since one part of the act was the breaking down a party wall between the houses of plaintiff and defendant, for which of course case would lie, and the rotting of the timber on the plaintiff's land was consequential to that.

(PATTESON, J.: The words are: "uncore cest action gist auxi, entant que est allege que per reason de ceo" (the pulling away plaintiff's tiles, which would have been a foundation for an action of trespass) "le tymber del mese fuit rott.")

It must be admitted that at one time the line was not strictly drawn.

(PATTESON, J.: How would the action be brought, in the case supposed by ALDERSON, B. in *Firmstone* v. *Wheeley* (4), of the defendant making a hole in the wall of plaintiff's house, and afterwards filling a reservoir so that the water escapes through the hole?)

It would be brought for the positive act of collecting the water. However, nothing was decided in that case.

[*597] (WIGHTMAN, J.: I *understand you to distinguish between continuing a positive nuisance on the plaintiff's land without removal, and not repairing an injury resulting from a state of things caused by the defendant on the plaintiff's land.)

Yes: in the latter case all the damages must be recovered in the first action for the injury: the former is the case of a positive continuing injury. That distinction explains *Westbourne* v. *Mordant* (5).

(WIGHTMAN, J., referred to *Holmes* v. *Wilson* (6).)

(1) 56 R. R. 762 (7 M. & W. 456).
(2) 1 Roll. Abr. 104, Action sur case (K) 3.
(3) 5 M. & W. 441.
(4) 13 L. J. Ex. 362.
(5) Cro. Eliz. 191.
(6) 50 R. R. 492 (10 Ad. & El. 503).

In that case the defendants had made erections on the plaintiff's land, and continued them there, actually using them.

(WIGHTMAN, J.: The defendants could not have removed without committing a trespass.)

It might there have been fairly answered that they had brought that difficulty on themselves. In *Taylor* v. *Stendall* (1) the defendant had injured a wall on the plaintiff's land; and it was held that he could not justify going upon the land for the purpose of repairing.

It is clear that Hornby could not have maintained this action, any more than the plaintiff in *Fetter* v. *Beale* (2) could have had an action for fresh injury arising from the original battery; since the reference here comprehended all injury accruing from what had been done. Nor could Starkey, or the plaintiffs, who were parties to the reference, and recovered damages therein. If Hornby and Starkey have suffered no actionable damage since the time of the reference, it would appear by the verdict that the plaintiffs never sustained any of the kind now complained of, for they took the land after that time, and of course took it as it stood.

The new assignment contains no allegation of request: as to that, therefore, if the request be material, the defendant must succeed. [598]

Hoggins, in reply:

The ground of complaint is, in effect, the turning on water to the land of the plaintiffs.

(PATTESON, J.: That is not the complaint.)

It is so in the new assignment.

(PATTESON, J.: That cannot go beyond the declaration.)

There is no demurrer. No argument for the defendant arises from Hornby having recovered: a feoffee may sue for a nuisance first created in the time of the feoffor: *Penruddock's* case (3). So the original nuisance, if continued, is a substantive cause of action, in whatever hands the premises causing the nuisance may be: *Rosewell* v. *Prior* (4), commented upon in *Thompson* v. *Gibson* (5).

Cur. adv. vult.

(1) 68 R. R. 528 (7 Q. B. 634).
(2) 1 Salk. 11. See note (*f*) to *Hambleton* v. *Vere*, 2 Wms. Saund. 171 d (6th ed.).
(3) 5 Co. Rep. 100 b.
(4) 2 Salk. 460.
(5) 56 R. R. 762 (7 M. & W. 461).

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LORD DENMAN, Ch. J., in this Term (June 2nd), delivered the judgment of the COURT:

This was an action on the case for wrongfully keeping and continuing open an aperture made by the defendant from a mine belonging to him into a mine which, at the time of making the aperture, belonged to James Starkey, but which he afterwards demised to the plaintiffs, who were in the occupation of the mine before and at the time of the bringing of the action; by means whereof quantities of water continued to flow from the defendant's mine into the plaintiffs'. The defendant pleaded Not guilty, and other pleas, one of which was a special plea stating in substance the
[*599] bringing of a former action on the case by Hugh Hornby *the owner of the plaintiffs' mine, J. Starkey being in possession as his tenant, against the defendant, for injury to his reversion by breaking and entering his mine and making the aperture in question and thereby causing the water to flood the coal strata; and that the cause and all matters in difference between the said H. Hornby and the defendant, and between Starkey and the defendant, were referred to an arbitrator, with liberty for the present plaintiffs to be parties to the reference as to any injury to them by reason of any of the matters alleged in that suit: that the plaintiffs did become parties to that reference, and that the arbitrator awarded separate sums to H. Hornby, J. Starkey and the plaintiffs, for the damage they had sustained: that these sums were paid: and that they were awarded and paid in respect of all consequential damages arising from the matters complained of in the action by H. Hornby.

To the special plea the plaintiffs new assigned that they brought their action for keeping and continuing the aperture open after the award. To this new assignment the defendant pleaded, admitting that the grievances complained of in the new assignment happened after the award, that they were only consequential damages arising from the matters alleged in H. Hornby's action, and in respect of which damages were awarded and paid as before stated.

To this plea the plaintiffs replied, setting out the award, and traversing that the grievances newly assigned were merely consequential damages as alleged in the plea.

Upon the trial the jury found a special verdict, by which it
[*600] appeared that, before and in 1839, J. Starkey *was mortgagor in possession, and H. Hornby mortgagee, of that part of the plaintiffs' mine into which the aperture was made: that, in that year, Starkey demised to the plaintiffs the premises in question: that, before that

demise, and whilst Starkey was mortgagor in possession, the defendant trespassed upon the mine in Starkey's possession, by breaking into it from his adjoining mine and taking the boundary coal in Starkey's mine to the extent of several yards: that in 1840 the plaintiffs proceeded to work the mine under the demise from Starkey, and, when they got within from six to ten yards of the boundary between their mine and the defendant's, they came to the excavation made by the defendant, and the water from his mine came in upon them, and continued to flow in upon them to the time of the plaintiffs bringing their action. It also appeared that the plaintiffs' and defendant's mines were on the same bed of coal, but that the defendant's workings were on the rise, and the plaintiffs' on the dip, and that it is the custom for the miners on the rise to work to their boundary, and for the miners on the dip to leave a barrier of from six to ten yards in their mine to protect them against the water from the mine upon the rise.

The facts of the case are fully stated upon the special verdict; but this short reference to them and to the pleadings is sufficient for the purpose of our judgment.

The question is, whether, upon the pleadings, and the facts found by the jury, the verdict upon Not guilty, and the replication to the plea to the new assignment, should be found for the plaintiffs or for the defendant; it being agreed (1) that the issues upon the 2nd and 3rd *pleas should be entered for the plaintiffs and the issue upon [*601] the 4th plea for the defendant.

We are of opinion that the defendant is entitled to have the verdict entered for him upon Not guilty, and upon the issue upon the replication to the plea to the new assignment.

The gist of the action, as stated in the declaration, is the keeping open and unfilled up an aperture and excavation made by the defendant into the plaintiffs' mine. By the custom, the defendant was entitled to excavate up to the boundary of his mine without leaving any barrier: and the cause of action, therefore, is the not filling up the excavation made by him on the plaintiffs' side of the boundary and within their mine. It is not, as in the case of *Holmes* v. *Wilson* (2), a continuing of something wrongfully placed by the defendant upon the premises of the plaintiffs; nor is it a continuing of something placed upon the land of a third person to the nuisance of the plaintiffs, as in the case of *Thompson* v. *Gibson* (3).

(1) See *ante*, p. 372, note (2).
(2) 50 R. R. 492 (10 Ad. & El. 503).
(3) 56 R. R. 762 (7 M. & W. 456).

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There is a legal obligation to discontinue a trespass or remove a nuisance; but no such obligation upon a trespasser to replace what he has pulled down or destroyed upon the land of another, though he is liable in an action of trespass to compensate in damages for the loss sustained. The defendant, having made an excavation and aperture in the plaintiffs' land, was liable to an action of trespass: but no cause of action arises from his omitting to re-enter the plaintiffs' land and fill up the excavation: such an omission is neither a continuation of a trespass nor of a nuisance; nor is it the breach of any legal duty.

[602] It was, however, contended on the part of the plaintiffs that, admitting this to be so, there nevertheless was a legal obligation or duty upon the defendant to take means to prevent the water from flowing from his mine into that of the plaintiffs through the aperture he had made: and the case of *Firmstone* v. *Wheeley* (1), in the Exchequer, in Trinity Term, 1844, reported in the 13th volume of the Law Journal Reports, was cited. The Court, however, in that case, did not determine that there was any such duty or obligation: and, if it had, that case would not be an authority applicable to the present, as the plaintiffs have not alleged any such duty or obligation in their declaration, nor is their action founded upon a breach of any such duty if it exists, but upon the omission to fill up the aperture made by them in the plaintiffs' mine. It appears to us that the defendant, upon the facts found by the jury, is entitled to have the verdict entered for him upon the plea of Not guilty.

The question that arises upon the new assignment is not very different from that which arises upon the plea of Not guilty. The plaintiffs have already recovered damages against the defendant for making the aperture; and the omitting to enter the plaintiffs' mine and fill up that aperture, in consequence of which the water continued to flow from the defendant's mine into the plaintiffs', affords no distinct ground of action, as for the continuance of a trespass or a nuisance: the flowing of the water, and the damage thereby to the plaintiffs, is merely consequential to the making the aperture; and for that the plaintiffs have already received compensation. The

[*603] *defendant, therefore, in our opinion, is entitled to have the verdict entered for him upon the issue taken upon the replication to the plea to the new assignment.

Judgment accordingly (2).

(1) 13 L. J. Ex. 361.

(2) See *ante*, p. 372, note (2).

SARAH MARY HOARE *v.* SILVERLOCK.

1848. *June* 27.

(12 Q. B. 624—634; S. C. 17 L. J. Q. B. 306; 12 Jur. 695.)

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In an action for writing and publishing of plaintiff that her warmest friends, in giving up their advocacy of her claims, stated that they had realised the fable of the Frozen Snake, if Not guilty be pleaded, and a verdict of Guilty found, the plaintiff is entitled to judgment, since the jury may have understood that the words "Frozen Snake" were meant to charge the plaintiff with ingratitude to friends. And it is no objection, in arrest of judgment, that the words are not explained by innuendo; for the Court will notice that the words are commonly enough understood in this sense to warrant a jury in so applying them.

It is a libel to write of a person soliciting relief from a charitable Society that she prefers unworthy claims which it is hoped the members will reject for ever, and that she has squandered away money, already obtained by her from the benevolent, in printing circulars abusive of the Society's secretary.

CASE. The first count of the declaration stated, by way of inducement, That the plaintiff, before and at the times of the committing &c., was the orphan daughter of Nicholas Hoare, deceased, who in his lifetime had been a lieutenant in the Royal navy, and the plaintiff, before and at the said several times, was, and still is, poor and in distressed circumstances, and had applied to a charitable Society called the Royal Naval Benevolent Society for pecuniary assistance: Yet defendant, well knowing &c., composed and published a libel of and concerning plaintiff; which was then set forth. The second count was for another libel.

The third count stated that defendant, further contriving &c., afterwards, to wit &c. (25th July, 1846), in a public newspaper called *The Nautical Standard and Steam Navigation Gazette*, falsely and maliciously composed and published, and caused and procured to be published, of and concerning plaintiff, and of and concerning her said application to the said *Society, another false, scandalous, [*625]
malicious and defamatory libel, containing, amongst other things, the false &c. matter following of and concerning the plaintiff, and of and concerning her said application to the said Society, viz.: "The Royal Naval Benevolent Society. We were sorry to perceive, by a report of last Monday's proceedings at a meeting of the above Society, that the case of Miss Hoare (meaning the plaintiff (1)), which we imagined had been entirely dismissed by the unanimous decision of a large body of officers of high rank and distinguished position in the service at the last quarterly court, had been re-opened, and that too by an officer distinguished no less for his illustrious services against the enemy than his noble descent. The gallant

(1) This innuendo after the mention of Miss Hoare (which it is not thought necessary to repeat) was the only one used in the third and fourth counts.

HOARE v. SILVERLOCK.

Rear-Admiral the Earl of Cadogan has happily been a stranger to those scenes which have occurred at the former meetings of this Society when the case of the above misguided woman has been brought forward. But, if he has escaped the exhibition of such conduct on the part of one or two officers who would by the display be certainly very much lowered in his estimation, his Lordship has unfortunately also missed the hearing of an overwhelming mass of evidence which is a complete justification for the Society's decision with respect to the claims of Miss Hoare, to say nothing of the recantation of some who were her warmest friends, and who, in giving up their advocacy of her claims, stated that they had realised the [*626] fable of the Frozen Snake." "Let the noble Earl *go to the Society's offices and examine carefully the documents, and make himself acquainted with the whole of the proceedings of the secretary and the Society in this matter, and he must come to the conclusion that the case of Miss Hoare is a most forlorn hope, and that, unfortunately, many much more worthy objects of the Society's benevolence are excluded from participation in it by the limited state of its funds."

The fourth count charged, with the same averments as were made in the third, publication in the above-mentioned newspaper by defendant on August 8th, 1846, of a libel, containing the following passages. "SIR,—Having attended the meetings of the Royal Naval Benevolent Society, and witnessed the painful and strong disputes in the case of Miss Hoare, I am led somewhat reluctantly to address these few observations to you in justice to our worthy secretary, and on behalf of our charitable institution, which has been upon recent events the scene of much discord and so very disreputable to the Society. The importunities of Miss Hoare and her supporters, although they have been upon every occasion outvoted by a very large majority of the members of the institution, have nevertheless operated in no small degree to suppress the contributions of several benevolent persons who, opposed to strife, would have added their pecuniary assistance to the naval widow and orphan but for our calamitous disunion. For one, I am determined to withdraw my subscription should any of our funds be granted to Miss Hoare: but I hope and trust the good sense of the members at our next meeting will, as heretofore, prevail, and reject for ever [*627] the unworthy *claims of Miss Hoare." "Bold (1) and strong

(1) The passage here referred to (of which some lines, not material to the decision of the case, are omitted) formed part of a different letter, but was stated to be contained "in another part of the said libel."

measures ought to be adopted to prevent the re-opening of Miss Hoare's case, which, in other words, means the renewal of an unjustifiable and apparently vindictive attack on the secretary. Who is this woman, that she is to engross almost the whole of the time of the Society? She is not entitled, as the descendant of a subscriber or in her own right, to relief; and it is avowed by her friends that she squandered away the money which she did obtain from the benevolent in printing circulars abusive of Commander Dickson. Really it is time that all this twaddle about humanity, and this display of knight errantry in defence of a slandered and forlorn damsel, should be laid aside." "The charge must be made against Commander Dickson, and, if it be not made, then let the case of Miss Hoare be buried in oblivion; and let not the discord which it has caused longer prevent the benevolent from subscribing for the widow and orphan" &c.

There was a fifth count, for another libel.

Plea, Not guilty. Issue thereon.

On the trial, before Coleridge, J., at the sittings in Middlesex after Michaelmas Term, 1847, a verdict was found for the plaintiff, and damages assessed generally, on the last three counts.

Talfourd, Serjt., in the ensuing Term, moved in arrest of judgment, on the ground that the passages declared upon in the last three counts were, on the face of them, not actionable. As to the third count, he contended *that the words "frozen snake" [*628] could not be deemed libellous unless shown to be so by an innuendo. He cited *Forbes* v. *King* (1).

(LORD DENMAN, Ch. J.: Suppose the expression had been "dog in the manger;" should you say an innuendo was necessary?)

A rule *nisi* was granted.

The Plaintiff in person now showed cause:

As to the 3rd count: the phrase "misguided woman" suggests impropriety of conduct, and is therefore libellous. "Every thing printed or written, which reflects on the character of another, and is published without lawful justification or excuse, is a libel:" *O'Brien* v. *Clement* (2), judgment of PARKE, B. The expression "frozen snake" is known, without the help of an innuendo, to imply treachery and ingratitude. The office of an innuendo is only

(1) 36 R. R. 829 (1 Dowl. P. C. 672). (2) 15 M. & W. 435.

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to explain doubtful allusions: and it is not wanted where the matter published of itself imports something disgraceful: *Digby* v. *Thompson* (1), *J'Anson* v. *Stuart* (2). If the words "frozen snake" required a formal explanation, so would every classical allusion. Could a plaintiff be called upon to prove the existence of a fable of the Frozen Snake? There could be no formal proof: it is in every one's knowledge. *Forbes* v. *King* (3) was a very different case from this. * * *

[630] *Corrie* was heard in support of the rule, *Talfourd*, Serjt. having left the Court:

The 3rd count does not contain any such charge of a deviation from moral duty as can be deemed libellous. At most, nothing is imputed but want of gratitude.

(LORD DENMAN, Ch. J.: Exemplified by stinging those who have encouraged her. That is the meaning of the "frozen snake." Even want of gratitude is a serious imputation.)

The mere absence of a moral quality is not such an imputation as can legally be a subject of libel. This case is not distinguishable from *Forbes* v. *King* (3).

(LORD DENMAN, Ch. J.: The imputation there implied nothing worse than being a black; a great misfortune perhaps, but no crime.)

The Court would not, in the absence of innuendo, take notice of the meaning. Suppose the allusion were to an Oriental fable or German story, not generally known except to scholars; would the Court recognize the meaning? * * *

[631] LORD DENMAN, Ch. J.:

There is no ground for our interference. The third count is certainly good. We are not called upon here to take judicial notice that the term "frozen snake" had or had not the meaning ascribed to it by the plaintiff, but to say, after verdict, whether or not a jury were certainly wrong in assuming that those words had the particular meaning. They are words well understood; there is no doubt that they are commonly known in a libellous sense: it must, here, have been left to the jury to say whether they were

(1) 38 R. R. 378 (4 B. & Ad. 821).
(2) 1 R. R. 392 (1 T. R. 748).
(3) 36 R. R. 829 (1 Dowl. P. C. 672).

used in that sense or not; and we must take it that they considered them as so applied. None of the cases sustain the objections here made. In *Robinson* v. *Jermyn* (1), the supposed libel alleged only that the proprietors of a subscription room did not think the plaintiff a fit person for their company, and therefore excluded him from their room, which might be rather a *compliment than a [*632] reproach. The "Friday" alluded to in *Forbes* v. *King* (2), was a very respectable person; black men have not been declared to be criminal by any Act of Parliament. The fourth count is certainly injurious to the plaintiff; for it describes her as an applicant to the Society for charity, but unfit to receive it, because she employs the money she obtains from the benevolent in circulating abuse of the secretary.

PATTESON, J.:

The principal question before us has been whether these words—"to say nothing of the recantation of some who were her warmest friends, and who in giving up their advocacy of her claims, stated that they had realized the fable of the Frozen Snake"—could import, on the face of them, any thing slanderous. If they could not, I am not prepared to say that judgment should not be given for the defendant on the third count, as upon demurrer. But, if they are capable of a libellous sense, it may be material that the jury has found that they were used in that sense. Then, as to the question whether an innuendo was necessary, I think it was not. Any ordinary person would be able to say what the allusion was; and the jury have found it. As to the fourth count; the expression "unworthy claims," alone, is strong; and then it is added "Who is this woman, that she is to engross almost the whole of the time of the Society? She is not entitled, as the descendant of a subscriber or in her own right, to relief: and it is avowed by her friends that she squandered away the money which she did obtain from the benevolent in printing circulars abusive of Commander Dickson." *These words manifestly infer misconduct, and tend to [*633] bring the plaintiff into contempt, and set the readers against her as a person who has misconducted herself towards this Society.

COLERIDGE, J.:

As to the necessity of an innuendo, the jury and Court in such a case as this are in an odd predicament, if they alone of all persons

(1) 1 Price, 11. (2) 36 R. R. 829 (1 Dowl. P. C. 672).

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are not to understand the allusion complained of. Suppose the libel had said the plaintiff acted like a Judas: must the history of Judas have been given, and referred to by innuendo? We ought to attribute to a Court and jury an acquaintance with ordinary terms and allusions, whether historical, or figurative or parabolical. If an expression, originally allegorical, has passed into such common use that it ceases to be figurative, and has obtained a signification almost literal, we must understand it as it is used. Half of our language is founded upon allegorical allusion: "vinegar" is talked of in describing a bad temper; even the word "sour" is figurative. We must understand such terms according to the sense which has become familiar.

ERLE, J.:

In this case the jury has decided on the sense of the words mentioned in the third count: and we cannot arrest the judgment unless we see, on reading the whole passage complained of, that there could be no ground for the construction they have adopted. Nothing is easier than to bring persons into contempt by allusion to names well known in history, or by mention of animals to which certain ideas are attached: and I may take judicial notice that the words "Frozen Snake" have an application very generally known
[*634] indeed, *which application is likely to bring into contempt a person against whom it is directed. I also think the fourth count libellous by the tendency it has to lower the plaintiff's character.

Rule discharged.

1848. *July* 12.

WHARTON AND ANOTHER *v.* NAYLOR AND ANOTHER (1).

(12 Q. B. 673—680; S. C. 17 L. J. Q. B. 278; 6 Dowl. & L. 136; 12 Jur. 894.)

[673]

Stat. 8 Ann. c. 14, s. 1, makes it unlawful to remove goods taken in execution without paying one year's arrears of rent to the landlord; but it does not invalidate the execution itself. Goods, therefore, so taken are *in custodiâ legis*, and cannot be distrained on by the landlord for the year's rent: And they are equally *in custodiâ legis*, for this purpose, whether they are in the hands of the sheriff or of a buyer from him (2).

TRESPASS. First count, for entering certain closes of the plaintiffs, and reaping and cutting down their wheat and oats. Second count, for seizing and carrying away the wheat, straw and oats of the plaintiffs.

(1) Explained in *Re Benn Davis, Ex parte Pollen's Trustees* (1886) 55 L. J. Q. B. 217.—A. C.

(2) See per CAVE, J. in *Re Benn Davis, supra*, at p. 219.—A. C.

4th plea. To the first count. That, before the said times when &c., one John Lind, for one year ending 13th May, 1846, and from thence until the said times when &c., held and enjoyed the said closes in *which &c., as tenant thereof to the defendants under a demise at the yearly rent of 80*l.* payable half-yearly &c. That before the said times when &c., to wit on 5th April, 1846, 40*l.* was due for the rent of one half year: wherefore the defendants entered and distrained the said wheat and oats for the said arrear of rent, and afterwards, when they became ripe, did cut the said wheat and oats in order to impound them as a distress upon the premises. Verification. [*674]

6th plea. To the second count, the like justification.

Replication to 4th plea. That, before the said times when &c., the plaintiffs recovered judgment against Lind to the amount of 377*l.* 8*s.* 5*d.*, &c., in an action of debt &c., and sued out a *testatum fieri facias*, by virtue of which the sheriff afterwards, to wit 1st May, 1846, took in execution the wheat and oats in the first count mentioned, the same being the growing crops of Lind, and thereupon, within a reasonable time afterwards, and before the said times when &c., and before the defendants entered or distrained as in the fourth plea mentioned, sold and assigned the said wheat and oats to the plaintiffs for 38*l.* 10*s.*; and plaintiffs thereupon became and were possessed thereof until the said times when &c.; and that, before a reasonable time had elapsed for the cutting &c. of the said wheat and oats by the plaintiffs, and whilst the same were growing, defendants entered &c. and seized and distrained &c. Verification.

The like replication to the sixth plea.

Rejoinder to the replication to 4th plea. That the said rent became so due long before the said time when the plaintiffs sued out the said writ, and long before the day of the *teste* of the same &c., and long before the *seizure in execution &c., to wit on the said 5th April, 1846, as in the fourth plea mentioned: That the said wheat and oats were upon the closes in which &c.; that the rent continued due at the time of the assignment; and that the rent due was not for more than a year, and amounted to &c. Averment of notice of all the above premises to plaintiffs and sheriff before the assignment. That defendants, before the sheriff sold to plaintiffs, required the sheriff to pay the said arrears of rent before the said wheat and oats should be sold or removed from the said closes: averment of notice to the plaintiffs and sheriff: That neither the sheriff nor any other person, before the sheriff sold to plaintiffs, or [*675]

WHARTON v. NAYLOR.

at any time before the said time when &c., paid the said rent to defendants. Wherefore defendants &c. (as in the fourth plea). Verification.

The like rejoinder to the replication to plea 6.

Demurrer to the first rejoinder, on the grounds, that it does not traverse any of the facts contained in the replication, and therefore confesses the same; and, although the facts are so confessed, yet the rejoinder does not avoid the same in law. That it should have shown a seizure for rent anterior to the seizure and sale by the sheriff: and that, the crops having been legally seized by the sheriff and sold to the plaintiffs, they were intitled to a reasonable time for gathering and removing them, and that, until such reasonable time had elapsed, the landlord could not legally distrain the same. That the rejoinder should have shown that the crops were removed from the premises by the sheriff or the execution creditors, without paying the landlord a year's rent. That neither the sheriff nor the execution creditors were liable to pay the said rent until [*676] *after a reasonable time had been allowed for gathering the crops, and until they were about to be removed from the premises. That the rejoinder offers no material issue, and is multifarious, uncertain, and in other respects informal and insufficient. Joinder in demurrer.

The like demurrer to the last rejoinder. Joinder in demurrer.

The case was argued in this vacation (1) by *Watson* for the plaintiffs and *Hindmarch* for the defendants.

The arguments and the authorities cited are fully noticed in the judgment of the COURT.

Cur. adv. vult.

PATTESON, J. now delivered judgment:

The declaration in this case contains two counts in trespass: the first for breaking and entering the closes of the plaintiffs, and cutting down growing crops of corn; the second upon a *cepit et asportavit*. The defendants plead to the first count, and justify under a distress for rent due for the closes from one John Lind. They also plead a similar plea to the second count. The plaintiffs reply separately to each plea, showing a judgment at the suit of the plaintiffs against John Lind, and a writ of *fieri facias*, under which the sheriff seized the growing crops in question, and sold them to the plaintiffs, and that, before a reasonable time had elapsed for cutting and gathering them, the defendants distrained and seized

(1) July 1st. Before Lord Denman, Ch. J., Patteson, Coleridge and Erle, JJ.

them. The defendants rejoin that the rent, for which the distress was made, became due long before the judgment, and that the sheriff and the plaintiffs had due notice of it; that it continued in arrear, *and did not exceed one year's rent; that they required the sheriff, before he sold to the plaintiffs, to pay the rent, of which also the plaintiffs had notice; and that it was not paid. The plaintiffs demurred. [*677]

On the argument it was contended for the defendants that, as regards the first count, the replication was a departure, inasmuch as the count alleges the closes to be the closes of the plaintiffs, whereas the replication shows them to have been the closes of John Lind. We think that there is nothing in this point. The plea, being in confession and avoidance, admits the possession of the plaintiffs at the time when the trespass complained of was committed: and there is nothing in the replication inconsistent with that fact; for it only admits the rent to be due from John Lind, and that he was in possession when the sheriff entered under the *fieri facias* long antecedent to the trespass complained of, both which circumstances are quite consistent with the possession of the plaintiffs at the time of that trespass.

The principal question in the case is, whether the growing crops so seized by the sheriff and sold to the plaintiffs could be distrained for antecedent rent of which the sheriff and the plaintiffs had notice, and which they neglected to pay. That goods which are in the custody of the law cannot be distrained for rent, is clear: the point therefore is, whether these crops are to be considered to have been in such custody when the defendants seized them. If the rent had been paid, it is plain that they would have been in such custody, though in the hands of a vendee under the sheriff, and not of the sheriff himself: *Peacock* v. *Purvis* (1). In that case it is true that the rent distrained *for accrued after the seizure under the *fieri facias*; but still it establishes the principle that the crops in the hands of the sheriff's vendee are as much *in custodiâ legis* as if in the hands of the sheriff, until they are in such a state as to be capable of removal. [*678]

We have then to consider what is the effect of the statute 8 Ann. c. 14, s. 1: whether goods seized by the sheriff under a writ of *fieri facias* are prevented by the operation of that statute from being *in custodiâ legis*, so far as regards the landlord's right of distress for one year's rent then due.

(1) 23 R. R. 465 (2 Brod. & B. 362).

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The statute says that no goods shall be liable to be taken by virtue of any execution unless the party at whose suit the execution is sued out shall, before the removal of such goods from off the premises by virtue such execution, pay to the landlord of the premises rent, not exceeding one year.

These words cannot be taken literally; the true construction is given in *Riseley* v. *Ryle* (1) by PARKE, B.: the meaning is, that the sheriff shall not remove the goods unless a year's rent be first paid. The seizure is lawful *primâ facie*: but, if the goods be removed without payment of the rent, after notice that it is due, such removal renders the whole proceeding unlawful as regards the landlord, and subjects the sheriff to an action on the case at his suit. The goods, however, in the meantime, until they are removed, are *in custodiâ legis*. A bill of sale of the goods is not a removal, as was established in the case of *Smallman* v. *Pollard* (2). If, indeed, the sheriff receives the proceeds under such bill of sale, either from [*679] a stranger *vendee absolutely, or from the execution creditor constructively, he, being an officer of the Court, will be compelled, on motion, to pay over a year's rent to the landlord: *West* v. *Hedges* (3), *Henchett* v. *Kimpson* (4); but such bill of sale and receipt will not amount to a removal so as to subject him to an action. In the case of growing crops, possibly the sheriff may sell, either for a sum of money to be paid immediately, or for a larger sum to be paid on reaping and removal of the crops; and in the latter case he could not be called upon by the landlord by motion to pay his rent until the time came for removal of the crops. The landlord is in no way injured by this; for, if there had been no execution, and he had distrained the crops for his rent under stat. 11 Geo. II. c. 19, s. 8, he could not sell them till they were reaped, and must therefore wait for his money till that time. There seems, therefore, to be no reason why he should be held to be authorised by the statute of Anne to do that which at common law he could not do, namely, to distrain goods *in custodiâ legis*, but rather that that Act intended to give him protection through the liability of the sheriff, in lieu of his right of distress, which is taken away by the seizure under a *fieri facias*. This appears to be the reasonable construction of the statute of Anne in regard to goods of any kind seized by the

(1) 63 R. R. 500 (11 M. & W. 16, 19, 20); see *Cocker* v. *Musgrove*, 9 Q. B. 223.

(2) 6 Man. & G. 1001.

(3) Barnes, 211.

(4) 2 Wils. 140; and see *Calvert* v. *Joliffe*, 2 B. & Ad. 418.

sheriff: and it is more strongly so in regard to growing crops, which, although liable to be taken in execution by the common law, were not liable to be distrained for rent until the statute 11 Geo. II. c. 19.

[*680]

It is true, that in the case of *Smallman* v. *Pollard* (1), *there are *dicta* of the learned Judges, especially of MAULE, J., intimating their opinion that, by the statute of Anne, the landlord's right to distrain is preserved; but those *dicta* were entirely beside the point on which the case was determined, which was simply that the declaration against the sheriff alleged a removal of the goods (which allegation CRESSWELL, J. considered to be necessary), and the fact of removal was not established by proof of a bill of sale, the goods remaining on the premises. With all possible respect towards the learned Judges whose *dicta* are there stated, we cannot agree with them in opinion. We think that the crops in question, having been lawfully seized by the sheriff (for, not having been removed at the time of the trespass complained of, the seizure of them had not been rendered unlawful), were *in custodiâ legis*, though in the hands of the plaintiffs, the vendees under a bill of sale from the sheriff, and could not by law be distrained for any rent. We think that the statute of Anne does not preserve any right in the landlord so to distrain, but gives him his remedy against the sheriff in lieu of such right: and that our judgment must be for the plaintiffs.

Judgment for plaintiffs.

DOE D. LORD EGREMONT *v.* LANGDON.

1845. *Nov.* 20. 1848. *July* 12.

(12 Q. B. 711—721; S. C. 18 L. J. Q. B. 17; 13 Jur. 96.)

[711]

Tenant for life, under a devise with a leasing power, let to defendant by a lease not noticing the power. After the death of lessor, a succeeding tenant for life, under the same devise, brought ejectment against defendant on the ground that the lease was not a valid execution of the power:

Held that defendant was not estopped from setting up an outstanding term of years in trustees, created by a tenant in fee from whom the devisor had inherited, and that (before stat. 8 & 9 Vict. c. 112 came into operation) a surrender of the term could not be presumed from mere lapse of time.

To prove the term, defendant called for the production of the deed creating it. The witness called upon stated that he held the deed as attorney for a mortgagee of the land, and that his client refused to produce it: and the witness himself declined to produce it, or to give oral evidence of the contents. Defendant then called as a witness the attorney of a party who had made a contract with the lessor of the plaintiff for exchange of lands: and he stated that on making the contract the attorney for the lessor of the plaintiff had furnished him with an abstract, referring to the deed in

(1) 6 Man. & G. 1001.

DOE d. LORD EGREMONT v. LANGDON.

question, which abstract he had compared with the original; that he held the abstract as evidence of the contract; that he had no instructions from his client, but would produce the abstract if the Judge thought he ought to do so. The Judge said, that he thought there was no sufficient reason why the witness should not; and it was produced as secondary evidence of the deed creating the term: Held that the evidence was properly produced.

EJECTMENT for messuages and lands in Somersetshire.

On the trial, before Wightman, J., at the Summer Assizes for Somersetshire, 1844, the case for the plaintiff was that Charles, Earl of Egremont, being seised in fee of the property in question, by his will, dated 31st July, 1761, devised it to George O'Brien, eldest son of the devisor, for life, remainders over (which failed), remainder to the fourth, fifth and other sons of the devisor, successively, in tail male; with a power to tenant for life, when in actual possession, to make leases. The devisor died in 1763: and George O'Brien, then Earl of Egremont, entered into possession as tenant for life, and, on 23rd March, 1826, let the property to the defendant for ninety-nine years if the defendant and two other persons named, or either of them, should so long live. The lease did not refer to the power. Earl George O'Brien died in 1837.

[*712] The lessor of the plaintiff was eldest son and heir-at-law of William Frederick Wyndham, who was fourth son of the devisor and died in 1828 (1). The plaintiff's counsel contended that the lease was not a valid execution of the power (2). The defendant's counsel called a witness, Bower, who had been attorney of the late General Blommart, and was now attorney of his representatives. Bower stated that, in 1840, General Blommart entered into a treaty with the lessor of the plaintiff for exchanging certain lands; and that an abstract of title was on that occasion handed to the witness by the attorney of the lessor of the plaintiff, who referred him to an attorney named Henderson, as having possession of the deeds named in the abstract. That the witness accordingly went to Henderson's, and compared the deeds with the abstract. Mr. Henderson's clerk was then called. He stated that he had with him two deeds, one dated 1708, the other dated 1757; and that these were deeds which Bower had compared with the abstract.

(1) See *Doe* d. *The Earl of Egremont* v. *Forwood* (relating to other property), 61 R. R. 339 (3 Q. B. 627), where some further dates and particulars respecting the family are given.

(2) The power will be found in *Doe* d. *Lord Egremont* v. *Stephens*, 66 R. R. 356 (6 Q. B. 208, 210): but it is not necessary to set it out here, or to notice the arguments relating to it, as the Court pronounced no decision on the validity of the lease. The arguments turned principally on the question, what lease was to be taken as the pattern lease.

But he objected to produce either, saying that they were part of the title deeds of mortgagees for whom Henderson held them, and that both the mortgagees and Henderson had directed him not to produce them: and he refused to answer any questions as to the contents. The defendant's counsel then called upon Bower to produce the abstract. Bower stated that his client claimed to be entitled *to the property under the contract of exchange, and that [*713] he held the abstract as part of the evidence of the contract; and that part of the arrangement had been that a term, created by the deed of 1708, should be assigned: that he had not applied to his client for leave to produce the abstract: but that he was ready to do so, if the learned Judge considered that he ought. His Lordship answered that there appeared no sufficient reason why he should not. The plaintiff's counsel objected: but the learned Judge allowed the abstract to be read. From this it appeared that the deed of 1708 was a settlement on the marriage of Sir William Wyndham, who was then tenant in fee of the premises in question, and from whom Earl Charles, the devisor, had inherited; and by which settlement Sir W. Wyndham demised lands, comprehending the property in question, to trustees for one thousand years, to satisfy certain purposes, after which the term was to attend the inheritance. By the deed of 1757 (executed after the death of Sir W. Wyndham), to which deed Earl Charles, the devisor, was a party, the deed of 1708 was recited; and it was directed that the term should be assigned to attend the inheritance, or in such other manner as Earl Charles, or the person entitled to the inheritance, should direct.

The plaintiff's counsel objected that the defendant was estopped from setting up this term. WIGHTMAN, J. directed a verdict for the plaintiff, reserving leave to move to enter a verdict for the defendant, or a nonsuit.

In Michaelmas Term, 1844, *Kinglake*, Serjt. obtained a rule *nisi* to enter a verdict for the defendant or a nonsuit, or for a new trial. In the same Term *Crowder*, *for the plaintiff, made a cross motion [*714] for new trial on the ground of the admission of the evidence; when the COURT said that he should be entitled to raise the point as an objection against the defendant's rule. In Michaelmas Term, 1845 (1),

Crowder, *Montague Smith* and *Phinn* showed cause:

First: the witness Bower ought not to have been compelled to

(1) November 20th. Before Lord Denman, Ch. J., Williams and Wightman, JJ.

DOE d. LORD EGREMONT v. LANGDON.

produce the abstract (1). *Doe* d. *The Earl of Egremont* v. *Date* (2) is undoubtedly a strong decision in favour of compelling an interested party to produce documents: but there the party (in whose place, by consent, the witness stood) might have been asked if he had seen the payment made, which was the only fact that it was sought to prove by the document. A witness who cannot be compelled to produce documents cannot be asked as to their contents: *Davies* v. *Waters* (3); it seems to follow that a witness who might be asked as to the contents may be required to produce the document: the first cited case, therefore, is not an authority on the present question. Further, in *Doe* d. *The Earl of Egremont* v. *Date* (2) the payment was of rent in respect of an estate which had expired. Perhaps, however, that decision cannot be supported to its [*715] *full extent. *Doe* d. *Peter* v. *Watkins* (4) resembles this case: there an attorney, who was employed by a party proposing to lend money, and in that character perused the abstract of the borrower's title to land offered as a security, was not allowed to give evidence of the contents (5), in an action between strangers. *Taylor* v. *Blacklow* (6) was there relied on by the Court. Here, at any rate, General Blommart ought to have been subpœnaed: the attorney was called upon to disclose what he learned in the character of attorney only.

Secondly, supposing the witness to have been rightly compelled to produce the evidence, it was not competent to the defendant to insist upon the term of years. That term was created in 1708: if it defeated the title of the present lessor of the plaintiff, it defeated also the title of Charles, Earl of Egremont: but by his will, dated 1761, the power was given under which George O'Brien, Earl of Egremont, granted the lease of 1826 to the defendant, who claims under it. In effect, therefore, the defendant is a lessee seeking to impugn the title of his lessor; and, as far as this question is concerned, it makes no difference that the lessor is dead: *Barwick*

(1) A question arose, whether the counsel for the plaintiff were entitled to take this objection on behalf of a third party; but it became unnecessary to decide the point. The following authorities were referred to: *Rex* v. *Woodley*, 42 R. R. 810 (1 Moo. & Rob. 390); *Marston* v. *Downes*, 1 Ad. & El. 31 (see *dictum* of PARKE, B. in *Weeks* v. *Argent*, 73 R. R. 732, 733 (16 M. & W. 817, 819)); *Doe* d. *The Earl of Egremont* v. *Date*, 61 R. R. 326 (3 Q. B. 609); *Davies* v. *Waters*, 60 R. R. 843 (9 M. & W. 608); *Mercer* v. *Whall*, 64 R. R. 544 (5 Q. B. 447); *Doe* d. *Peter* v. *Watkins*, 43 R. R. 701 (3 Bing. N. C. 421).

(2) 61 R. R. 326 (3 Q. B. 609).

(3) 60 R. R. 843 (9 M. & W. 608).

(4) 43 R. R. 701 (3 Bing. N. C. 421).

(5) The marginal abstract there has the words "against the borrower:" but *quære*, whether the text shows such a qualification.

(6) 43 R. R. 626 (3 Bing. N. C. 235).

d. *Mayor of Richmond* v. *Thompson* (1), *Doe* d. *Colemere* v. *Whitroe* (2), the effect of which case is more accurately stated in Harrison's Digest, vol. 2, p. 3696 (ed. 3), than in the marginal note to the report. It will, perhaps, be argued that, as estoppels must be mutual, and as the lessor of the plaintiff seeks *to impugn [*716] the lease of 1826, the defendant may do so too. But the lease was good for the life of Earl George O'Brien, especially as it does not notice the power, which circumstance distinguishes this case from *Roe* d. *Earl of Berkeley* v. *Archbishop of York* (3): the lessor of the plaintiff insists merely on the expiration of the interest of Earl George O'Brien, the tenant for life; and this may be done: *Blake* v. *Foster* (4): whereas the defendant, by insisting on the term, denies his lessor's interest from the first, and asserts that he had no title when he let the defendant into possession. The law on this point is collected in note (1) to *Walton* v. *Waterhouse* (5). Earl George O'Brien would himself have been estopped from denying the title of the devisor, by having accepted the life estate: note to *Doe* d. *Christmas* v. *Oliver* (6) in Smith's Leading Cases (7), referring to Co. Litt. 352 a. And, as against him, there would be a mutuality of estoppel, since the remainderman would be bound to allow emblements to his executor: Co. Litt. 55 b. In *Gaunt* v. *Wainman* (8) (the correctness of which decision might perhaps be questioned) the estoppel, which was not allowed, was claimed as between entire strangers: at least the Court so understood it; though the wife there, according to the earlier authorities, was not a stranger as to this: Com. Dig. Estoppel (D), 10 Vin. Abr. 446, Estoppel (L.), pl. 1. The book last mentioned refers to Year B. Mich. 3 Hen. IV. fol. 6 A. pl. 27, which, it must be admitted, hardly supports the proposition.

Butt and *Kingslake*, Serjt., *contrà*: [717]

(LORD DENMAN, Ch. J.: I think it cannot be said that the witness was in fact compelled to produce the document: he did not insist on the objection.)

Then the only question is, whether there be an estoppel.

(1) 4 R. R. 499 (7 T. R. 488).
(2) 25 R. R. 769 (Dowl. & Ry. N. P. C. 1).
(3) 8 R. R. 413 (6 East, 86).
(4) 5 R. R. 419 (8 T. R. 487).
(5) 2 Wms. Saund. 418.
(6) 34 R. R. 358 (10 B. & C. 181; S. C. 5 Man. & Ry. 202).
(7) 2 Sm. L. C. 455.
(8) 43 R. R. 597 (3 Bing. N. C. 69).

DOE d. LORD EGREMONT v. LANGDON.

(WIGHTMAN, J.: I confess I do not understand *Doe* d. *Colemere* v. *Whitroe* (1).)

The effect of that case is only that an estoppel which is good as between a tenant for life and his lessee, is also good in favour of the reversioner of tenant for life, if he affirm the lease and the rent be paid to him by the tenant (2). The present case must be decided on the principle laid down in Com. Dig. Estoppel (F), that "an estoppel determines by cesser of the act, deed, &c., which made the estoppel;" of which rule *Brereton* v. *Evans* (3) is there cited as an instance. There is no privity between successive tenants for life: therefore an estoppel of which the first tenant for life can take advantage does not pass to a succeeding one. That estoppels must be mutual appears from Com. Dig. Estoppel (B), and does not seem to be disputed.

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

This was an ejectment tried before my brother Wightman at the Summer Assizes, 1844; when a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court upon several points that were reserved.

[*718] It was brought to try the validity of certain leases *made by the late Earl of Egremont, under a power contained in the will of Charles, Earl of Egremont, dated in July, 1761. The defendant held the premises in question under a lease for lives, made by the late Earl, under the power, on the 23rd March, 1826. The lessor of the plaintiff contended that the lease under which the defendant held was not in accordance with or warranted by the power.

But an objection was taken, which, if well founded, was fatal to the plaintiff's right to recover, and rendered the consideration of the questions as to the validity of the lease unnecessary. The objection was, that there was a term, outstanding in trustees, of a thousand years, created in 1708, for certain purposes, and then to attend the inheritance. And it appeared that, by an indenture of the 1st of March, 1757, the indenture creating the term was recited, the specific objects of the trust were declared to be satisfied, and the executor of the surviving trustee of the term was required to assign it to attend the inheritance.

(1) 25 R. R. 769 (Dowl. & Ry. N. P. C. 1).

(2) The receipt of rent by the reversioner is stated in the marginal note but does not appear from the text.

(3) Cro. Eliz. 700.

The deeds themselves were in Court, but in the hands of the solicitor for mortgagees, who declined to produce them, as being part of the mortgage title. Secondary evidence, however, was given of the deeds, by means of an abstract, compared with the originals, and produced under circumstances which we think warranted the *reception of such evidence.

The abstract was produced by the solicitor for a gentleman who had proposed to exchange some property with Lord Egremont, but which exchange had not been carried into effect, and who had therefore no title which could be affected by the production of it. Nor had the solicitor any instructions from any one *not to produce it. [*719] He did not volunteer the production, but said he was ready to do so, if the Judge thought that he ought to produce it. The Judge thought there was no sufficient reason why he should not: and we are of the same opinion.

The question then is, there being no demise by the trustee of the term, whether that term, created in 1708 and existing in 1757, could be now set up by the defendant, to defeat the claim of the lessor of the plaintiff.

There was no evidence in the case to warrant the presumption that it was either surrendered or merged in the inheritance. On the contrary, the last document respecting it showed that it was kept alive in order to attend the inheritance.

It was formerly considered that old terms assigned to attend the inheritance might, when set up to defeat the title of the person for the protection of whose estate they were assigned, be presumed to have been surrendered: *Doe* d. *Burdett* v. *Wrighte* (1), in which all the previous cases are cited and considered. But it has subsequently been held, and we think rightly, that the surrender of a term to attend the inheritance is not to be presumed from mere lapse of time, or unless there be express evidence to warrant such presumption: *Doe* d. *Blacknell* v. *Plowman* (2). Several cases are cited (3) in Sugden on Vendors and Purchasers, in which Lord ELDON expressed a strong opinion that to presume the surrender of a term to attend the inheritance would in most cases defeat the object intended by the assignment of such terms. It may *therefore be [*720] taken that, after the decision of *Doe* d. *Blacknell* v. *Plowman* (2), down to the passing of statute 8 & 9 Vict. c. 112, the surrender of a term

(1) 21 R. R. 461 (2 B. & Ald. 710).

(2) 2 B. & Ad. 573.

(3) Appendix, No. 26, p. 1128 of 11th ed.

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to attend the inheritance was not to be presumed from mere lapse of time; and that the omission of a demise in the declaration by the person entitled to the term would defeat an ejectment by the beneficial owner. The statute of Victoria, taking effect only from the 31st of December, 1845, does not affect the present case.

But it was said that the defendant himself held under the same original title as that under which the plaintiff claimed; and the cases of *Doe* d. *Colemere* v. *Whitroe* (1) and *Barwick* d. *Mayor of Richmond* v. *Thompson* (2) were cited. In the first of these cases, it was held that the interest of a tenant for life and reversioner were the same, and that a lessee of tenant for life could not show adverse title in another at the time of lease granted, but he might show prior title. In *Barwick* d. *Mayor of Richmond* v. *Thompson* (2) it was held that a tenant could not dispute the title of the person under whom he held as tenant. Neither of these cases is applicable to the present: for the defendant does not deny the general title of the lessor of the plaintiff, but, in an adverse action to defeat his lease, insists upon the prior legal title of a trustee of a term to attend the inheritance for the protection of the estate of the lessor of the plaintiff, under whom, as the lessor of the plaintiff contends, the defendant does not hold. There is no rule of law to prevent the defendant setting up the outstanding term in such a case as this, the lessor of the plaintiff himself denying the right of the defendant's lessor to grant the lease.

[721] Upon the whole, therefore, we think that the omission of a demise by the owner of the term is a fatal defect in the plaintiff's case, and entitles the defendant to a nonsuit, making it unnecessary for us to consider the other questions in the case.

Rule absolute for a nonsuit.

1848. *July* 12.

COUSINS *v.* HARRIS AND OTHERS.

(12 Q. B. 726—734; S. C. 17 L. J. Q. B. 273; 12 Jur. 835.)

[726] Under the Land Tax Redemption Act, 1802 (42 Geo. III. c. 116), a remainder man in possession can compel the representatives of the tenant of a previous particular estate, who has redeemed the land tax, to receive the consideration money for such redemption, with all arrears of interest.

(1) 25 R. R. 769 (1 Dowl. & Ry. N. P. C. 1).

(2) 4 R. R. 499 (7 T. R. 488).

so as to free the land from the charge and payment of the interest to which it was subject for the benefit of such tenant under sect. 123.

And a tenant in common of the remainder, if he tender the whole amount and that is refused, and the interest distrained for, may plead the tender in bar of an avowry.

REPLEVIN. Avowry: that the close in which &c. had been subject to a land tax of 20*l.* a year, under stat. 42 Geo. III. c. 116; that the tenant for life, since deceased, had redeemed the land tax by a money payment according to the provisions of the said Act; and that the close in which &c. thereupon became chargeable, for the benefit of the tenant for life, his executors, administrators or assigns, with the amount paid as the consideration of such redemption, and with the payment of a yearly sum by way of interest thereon, equal in amount to the land tax so redeemed. That defendants had become entitled to the said yearly sum (under the will of the tenant for life, and by assignment), and distrained for arrears. Verification.

Plea. That plaintiff, at the time when &c., was tenant of the close by demise from three persons who, upon the death of the tenant for life, became seised thereof in fee as tenants in common; and that, after the accruing of such arrears, and before the time when &c., *two of such tenants in common (without the privity of the third), for the purpose of freeing the land from charge in respect of the consideration money paid as aforesaid, and from the said payment of interest, tendered and offered to the persons entitled, viz. to defendants, a sum, viz. 600*l.*, such sum being equal in amount to the money so paid as the consideration &c., and all yearly sums of money by way of interest thereon equal in amount to the land tax redeemed as aforesaid, then in arrear, to wit all the arrears in the avowry mentioned; which defendants refused to receive. Verification. General demurrer and joinder. [*727]

The case was argued (1), in this vacation, by *Hoggins* for the defendants, and *Bramwell* for the plaintiff.

The arguments are fully noticed in the judgment of the COURT.

Cur. adv. vult.

PATTESON, J., now delivered judgment:

In replevin, the defendants avowed for the interest upon a sum paid for the redemption of the land tax on the land by a former tenant for life under whom they claimed. The plaintiff pleaded

(1) July 1st. Before Lord Denman, Ch. J., Patteson, Coleridge and Erle, JJ.

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that he held a moiety of the remainder in fee, and, being desirous of freeing the lands from this charge, had, before the distress, tendered to the defendants the principal sum paid for such redemption, together with all the interest that was due, and that they had refused the same.

By the demurrer thereto the question raised is, whether the person in remainder, who has come to the possession of land, can compel the assignees of the tenant of a previous particular estate, who has redeemed *the land tax charged on such lands out of his own property, to receive at any time the principal money paid as the consideration for such redemption, together with all arrears of interest, and so to free the land from the charge and the payment of interest. If he can, the plea is valid; because it shows a tender of the principal and interest before the distress: and, though the present plaintiff is only tenant in common of a moiety, still, if the right exists for a remainderman in severalty, it appears to us that it would exist for each tenant in common who might take the estate in remainder.

[*728]

The point depends upon the effect of stat. 42 Geo. III. c. 116, s. 128, which, in case of redemption of the land tax by a tenant of an estate not of inheritance, enacts that the lands shall be and become chargeable for the benefit of such tenant, his executors, administrators or assigns, with the amount of the moneys paid as the consideration for the redemption, and with the payment of a yearly sum by way of interest thereon, equal in amount to the land tax redeemed. The plaintiff contends that the land is hereby made subject to the payment of a debt and interest, which the holder of the land may at any time discharge. The defendants contend that the land is made subject to a perpetual annuity or rent-charge equal to the amount of the interest. It appears to us that the plaintiff's is the true construction.

If we confine our attention to this section, the expression, that the land shall be chargeable with the principal sum for the benefit of the tenant and his executors, indicates the existence of a debt, and would have no effect if the enactment made the payment of interest an annuity without power of redemption, and gave neither party any right in respect of the principal; *also the expression that interest should be due implies a debt, and is not the language for creating an annuity.

[*729]

If we regard the other parts of the statute, the presumption in favour of this construction is increased. The Legislature has

provided for charging the land tax redeemed either in perpetuity or for a time, and has used throughout the Act appropriate language for a continuing annual charge where such was the intention. By sect. 88, when Bishops redeem with moneys raised under the statute, the land tax redeemed is made a perpetual charge to be added to the accustomed yearly rent. So, by sect. 89, in case of redemption of the land tax on the lands comprised therein, it is added to the rent of existing leases. But the 154th section affords the most important contrast, which provides for the sale of the land tax to a purchaser unconnected with the estate: it provides that such purchaser and his heirs shall be entitled to demand, and shall be deemed to be in the actual seisin of, a yearly rent, as a fee farm rent, equal to the land tax redeemed, to be issuing and payable out of the lands which were liable.

It is not easy to suppose that the Legislature intended to produce the same result by two enactments which are so very different in their words. The precautions required by the statute before a stranger is allowed to fix an annual payment irredeemable on the lands make it probable that the enactment in question was intended to create a debt payable at any time.

The statute regards those who are interested in the estate, whether jointly or successively, as one owner, and gives to any one of them a preference over strangers to redeem (1), and prevents the sale to a stranger till notice has been given to them, and they have refused to redeem; *it being considered that the fixing a perpetual [*730]
rent-charge on the estate might be a great inconvenience to the owners. But, in the case where the ownership is to pass to several in succession, and the preference to redeem is given to the holder of the particular estate who happens to be in possession, it would be an unreasonable sacrifice of those in remainder to him if he was allowed the choice of investing his money so as to fix a perpetual incumbrance on those who are to succeed, they probably being of the same family, or taking under the same grantor, and so not wholly to be disregarded by the tenant of the particular estate; and they being, in many instances, either under the disabilities of coverture or infancy and so incapable of default, or holding contingent interests only, and so not entitled to interfere. If the tenant of the particular estate makes the necessary advance, it is just to him that his advance with interest should be secured to him; and it is just to those in remainder that they, so indemnifying

(1) See sects. 19, 124, 151, 152.

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him, should be allowed to free their estate. The construction we adopt attains these objects.

It is confirmatory, that the clause relating to redemption by one coparcener, sect. 124, is worded in the same way. They may well be considered to be of one family, and the advance by one to be a loan to the others secured on their estate, which they might pay off with interest, this being an indemnity to the coparcener that made the advance: and such redemption is distinguishable from the more hostile description, where a stranger has the fee farm rent above mentioned in case of total default of all interested in the estate.

The statute is *in pari materiâ* with, and, in a degree, in furtherance of, stat. 38 Geo. III. c. 60: and a reference to that statute
[*731] makes the construction clear. That *statute also gave a preference to those who were interested (1), and enabled tenants not of the inheritance to redeem, and gave such tenant an option, either to declare his wish to be considered on the footing of a purchaser not being interested, or not; and, if he so declares, he is to have all the rights of such purchaser (sect. 17); and, by sect. 37, he and his executors, administrators and assigns are to hold the land tax so redeemed as an annuity issuing out of the lands, subject to a power of redemption about to be mentioned; and, by sect. 18, where such option shall have been declared by such tenant, viz. to have a continuing annuity, it shall be lawful for those in remainder, at any time after the remainder has vested in possession, to demand from the proprietor of such annuity (that is the land tax) an assignment of his interest therein, on transferring to him the same amount of 3 per Cent. stock as was transferred by the original contractor for redemption; and such proprietor is to make an immediate assignment; and persons under disability are capacitated to assign. These are the provisions for the alternative of such tenant electing to have a continuing annuity. The Legislature pointedly negatives his right to effect this against the will of those in remainder, and enables them at any moment after possession to clear the land of the annuity by transferring the same amount of stock. The provisions for the other alternative, when such tenant does not so declare his option, are now to be considered. In that case, by sect. 37, the lands shall be and become chargeable for the benefit of such person, his executors, administrators or assigns, with the amount of the 3 per Cents. which shall have been transferred as

(1) Sect. 12.

the consideration for redemption, and with the *payment of such yearly sum of money by way of interest thereon as shall be equal to the land tax redeemed. It is almost certain that the Legislature must, by these words, have intended to create a debt in the nature of a mortgage, which the mortgagor, upon coming to the possession, might at any time pay off by returning the principal stock and paying up the interest. For it would be inconsistent to provide that the annuity might be redeemable at any moment if the tenant for life declared his option to have it permanent, but, if he declared no such option, it should be permanent and those in remainder should have no power of redemption; so that permanence should be taken away where the option to have it should be declared, and should be granted where such option is not declared. [*732]

These being the provisions in respect of options by such tenants in stat. 38 Geo. III. c. 60, by stat. 42 Geo. III. c. 116, certain alterations are made. The power of declaring the option is no longer to exist; a power to dispose of the cases where the option has been already declared under the former Act is provided by sect. 40; and, by sect. 23, if the land tax does not exceed 25*l*., the consideration for redemption may be money instead of stock. Then, by sect. 123, the provision is made for charging the land with the debt in case of redemption by tenant of a particular estate. The provision is literally the same as that in stat. 38 Geo. III. c. 60, for such charge where such tenant had not declared his option. In that case, we have seen, the words created a debt which those in remainder might at any moment pay off. And, as stat. 38 Geo. III. c. 60, is for many purposes recognised and continued by the present Act, it is almost certain that the Legislature, by re-enacting this clause in terms, intended it should have its former effect.

These being the reasons for the construction that the debt and interest might be paid off, it remains to consider the grounds adduced for holding that a permanent charge was created. It was said that there were no words expressly compelling the creditor to receive the debt. But express provision is not to be expected: generally speaking, no compulsion is necessary for the receipt of a debt. It was said that there was no provision for compelling a debtor to pay at any time. There is not: but the Legislature may have well considered that the lands were an ample security, that the interest was a compensation, and that, if the principal was wanted, this charge, as a mortgage, might be assigned, and so the consideration raised. It was said there was hardship in giving [733]

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those in remainder the option to pay off at any moment, because they might choose to pay off when the 3 per Cents. were low, and so gain an advantage. But this ground is founded on misconception. By stat. 38 Geo. III. c. 60 (1), the consideration was to be 3 per Cent. stock, and the payment was to be by transfer of stock only. By stat. 42 Geo. III. c. 116, where the land tax does not exceed 25*l.*, the consideration may be money. In the present case the land tax was 20*l.*, and the consideration was money, as alleged in the pleadings; and, therefore, those who seek to pay off the debt have to repay the same amount of money which was originally paid for the redemption; and the price of stocks has no bearing. Even if this inconvenience had existed, it would have been no argument: for stat. 38 Geo. III. c. 60, s. 18, expressly provided for redemption at any moment by transferring an equal amount of stock.

If inconvenience is to be considered at all, it affords a strong
[*734] argument in favour of the construction we *have adopted: for thereby an indemnity is secured for the tenant who advances the money; and a provision to free from an incumbrance is secured to the successors: but, by the other construction, the tenant of the particular estate might injure the inheritance by a perpetual incumbrance affecting every part of it, and without a power of apportioning the charge, which would be requisite, and which is expressly provided, where a permanent rent-charge is intended, by sect. 155.

It follows that our judgment is for the plaintiff.

Judgment for plaintiff.

HUMPHRIES *v.* BROGDEN (2).

1850.
May 23, 24.
Nov. 21.

(12 Q. B. 739—757; S. C. 20 L. J. Q. B. 10; 15 Jur. 124.)

[739]

Action on the case by the occupier of the surface of land for negligently and improperly, and without leaving any sufficient pillars and supports, and contrary to the custom of mining in the country where &c., working the subjacent minerals, *per quod* the surface gave way. Plea: Not guilty. It was proved on the trial that plaintiff was in occupation of the surface, and defendant of the subjacent minerals; but there was no evidence how the

(1) Sect. 9.

(1) Cited in numerous cases, including *Solomon* v. *Vintners' Co.* (1859) 4 H. & N. 598, 28 L. J. Ex. 370; *Rowbotham* v. *Wilson* (1860) 8 H. L. C. 360; *Lamb* v. *Walker* (1878) 3 Q. B. D. 389, 401, 47 L. J. Q. B. 458; *Dalton* v. *Angus* (1881) 6 App. Ca. 740, 792, 50 L. J. Q. B. 730; *Mundy* v. *Duke of Rutland* (1883) 23 Ch. D. 81, 89; *Pountney* v. *Clayton* (1883) 11 Q. B. D. 820, 839, 52 L. J. Q. B. 572.—A. C.

occupation of the superior and inferior strata came into different hands. The surface was not built upon. The jury found that the defendants had worked the mines, carefully and according to custom, but without leaving sufficient support for the surface :

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Held that the plaintiff was, on this finding, entitled to have the verdict entered for him; for that, of common right, the owner of the surface is entitled to support from the subjacent strata; and, if the owner of the minerals removes them, it is his duty to leave sufficient support for the surface in its natural state.

THIS was an action against the Durham County Coal Company, sued in the name of their secretary. On the trial, before Coleridge, J., at the Durham *Spring Assizes, 1850, the jury, in answer [*740] to questions put by the learned Judge, found the facts specially. His Lordship then directed a verdict for the plaintiff, giving the defendants leave to move to enter a verdict for them upon the findings of the jury. *Knowles*, in Easter Term, 1850, obtained a rule *nisi* accordingly. In Trinity Term, 1850 (1),

Watson and *Joseph Addison* showed cause, and *Knowles* and *Hugh Hill* supported the rule. The judgment of the COURT states so fully the nature of the case, the pleadings, and the arguments and authorities adduced on both sides, as to render any farther statement unnecessary.

Cur. adv. vult.

LORD CAMPBELL, Ch. J., now delivered the judgment of the COURT:

This is an action on the case. The declaration alleges that the plaintiff was possessed of divers closes of pasture and arable land, situate, &c., yet that the Company, so wrongfully, carelessly, negligently, and improperly, and without leaving any proper and sufficient pillars or supports in that behalf, and contrary to the custom and course of practice of mining used and approved of in the country where the mines thereinafter mentioned are situate, worked certain coal mines under and contiguous to the said closes, and dug for and got and moved the coals, minerals, earth and soil of and in the said mines, that by reason thereof the soil and surface of the said closes sank in, cracked, swagged and gave way; and thereby &c. The only material plea was Not guilty.

The cause coming on to be tried before my brother Coleridge at [741] the last Spring Assizes for the county of Durham, it appeared that the plaintiff was possessed of the closes described in the declaration, and that the Durham County Coal Company (who may sue and be

(1) On the 23rd and 24th May, 1850. Before Lord Campbell, Ch. J., Patteson, Coleridge and Erle, JJ.

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sued by their secretary) were lessees, under the Bishop of Durham, of the coal mines under them; but there was no other evidence whatever as to the tenure or the title either of the surface or of the minerals. It appeared that the Company had taken the coals under the plaintiff's closes, without leaving any sufficient pillars to support the surface, whereby the closes had swagged and sunk, and had been considerably injured; but that, supposing the surface and the minerals to have belonged to the same person, these operations had not been conducted carelessly or negligently or contrary to the custom of the country. The jury found that the Company had worked carefully and according to the custom of the country, but without leaving sufficient pillars or supports: and a verdict was entered for the plaintiff for 110*l.* damages, with leave to move to enter a verdict for the defendant, if the Court should be of opinion that under these circumstances the action was not maintainable.

The case was very learnedly and ably argued before us in Easter and Trinity Terms last. On account of the great importance of the question, we have taken time to consider of our judgment.

For the defendant it was contended that, after the special finding of the jury, the declaration is defective in not alleging that the plaintiff was entitled to have his closes supported by the subjacent strata. But we are of opinion that such an allegation is unnecessary

[*742] to *raise the question in this action, Whether the Company, although they did not work the mines negligently or contrary to the custom of the country, were bound to leave props to support the surface? If the easement which the plaintiff claims exists, it does not arise from any special grant or reservation, but is of common right, created by the law, so that we are bound to take notice of its existence. In pleading, it is enough to state the facts from which a right or a duty arises. The carefully prepared declaration in *Littledale* v. *Lord Lonsdale* (1), for disturbing the right of the owner of the surface of lands to the support of the mineral strata belonging to another, contains no express allegation of the right; and, if the omission had been considered important, it probably would have been relied upon, rather than the objection that a Peer of Parliament was not liable to be sued in the Court of King's Bench by bill.

We have therefore to consider, whether, when the surface of land (by which is here meant the soil lying over the minerals) belongs to one man, and the minerals belong to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner

(1) 2 H. Bl. 267 (*Earl of Lonsdale* v. *Littledale*).

of the minerals may remove them without leaving support sufficient to maintain the surface in its natural state? This case is entirely relieved from the consideration how far the rights and liabilities of the owners of adjoining tenements are affected by the erection of buildings; for the plaintiff claims no greater degree of support for his lands than they must have required and enjoyed since the globe subsisted in its present form.

Where portions of the freehold, lying one over another perpendicularly, belong to different individuals, and constitute (as it were) separate closes, the degree of support to which the upper is entitled from the lower has as yet by no means been distinctly defined. But, in the case of adjoining closes which belong respectively to different persons from the surface to the centre of the earth, the law of England has long settled the degree of lateral support which each may claim from the other: and the principle upon which this rests may guide us to a safe solution of the question now before us. [743]

In 2 Rolle's Abridgement, 564, tit. Trespass (I), pl. 1., it is said: "If A., seised in fee of copyhold land next adjoining land of B., erect a new house on his copyhold land" (I may remark that the circumstance of A.'s land being copyhold is wholly immaterial), "and part of the house is erected on the confines of his land next adjoining the land of B., if B. afterwards digs his land near to the foundation of the house of A., but not touching the land of A., whereby the foundation of the house and the house itself fall into the pit, still no action lies at the suit of A. against B., because this was the fault of A. himself that he built his house so near to the land of B., for he could not by his act hinder B. from making the most profitable use of B.'s own land: Easter Term, 15 Car. B. R. *Wilde* v. *Minsterley*. But, *semble* that a man who has land next adjoining to my land cannot dig his land so near to my land that thereby my land shall fall into his pit; and for this, if an action were brought, it would lie." This doctrine is recognised by Lord C. B. COMYNS, Com. Dig. Action upon the case for a nuisance (A); by Lord TENTERDEN, *in *Wyatt* v. *Harrison* (1); and by other eminent Judges. It stands on natural justice, and is essential to the protection and enjoyment of property in the soil. Although it places a restraint on what a man may do with his own property, it is in accordance with the precept, *sic utere tuo ut alienum non lædas*. As is well observed by a modern writer: "If the neighbouring owners might excavate their soil on every side up to the boundary line to an indefinite depth, land thus [*744]

(1) 37 R. R. 566 (3 B. & Ad. 871, 876).

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deprived of support on all sides could not stand by its own coherence alone:" Gale on Easements, p. 216 (1).

This right to lateral support from adjoining soil is not, like the support of one building upon another, supposed to be gained by grant (2), but is a right of property passing with the soil (3). If the owner of two adjoining closes conveys away one of them, the alienee, without any grant for that purpose, is entitled to the lateral support of the other close the very instant when the conveyance is executed, as much as after the expiration of twenty years, or any longer period. *Pari ratione*, where there are separate freeholds from the surface of the land and the minerals belonging to different owners, we are of opinion that the owner of the surface, while unincumbered by buildings and in its natural state, is entitled to have it supported by the subjacent mineral strata. Those strata may of course be removed by the owner of them, so that a sufficient support for the surface is left: but, if the surface subsides and is injured by the removal of these strata, although, on the supposition that the surface and the minerals belong to the same owner, the operation may not have
[*745] been conducted *negligently nor contrary to the custom of the country, the owner of the surface may maintain an action against the owner of the minerals for the damage sustained by the subsidence. Unless the surface close be entitled to this support from the close underneath, corresponding to the lateral support to which it is entitled from the adjoining surface close, it cannot be securely enjoyed as property; and under certain circumstances, as where the mineral strata approach the surface and are of great thickness, it might be entirely destroyed. We likewise think that the rule giving the right of support to the surface upon the minerals, in the absence of any express grant, reservation or covenant, must be laid down generally without reference to the nature of the strata, or the difficulty of propping up the surface, or the comparative value of the surface and the minerals. We are not aware of any principle upon which qualifications could be added to the rule; and the attempt to introduce them would lead to uncertainty and litigation: greater inconvenience cannot arise from this rule, in any case, than that which may be experienced where the surface belongs to one owner, and the minerals

(1) 7th ed. 328.

(2) See *Dalton* v. *Angus* (1881) 6 App. Ca. 792, 50 L. J. Q. B. 730.—A. C.

(3) See *Bonomi* v. *Backhouse* (1861) 9 H. L. C. 503, 34 L. J Q. B. 181; *Lamb* v. *Walker* (1878) 3 Q. B. D. 401, 47 L. J. Q. B. 458 (dissenting judgment of COCKBURN, C. J.); *Darley Main Colliery Co.* v. *Mitchell* (1886) 11 App. Ca. 137, 55 L. J. Q. B. 533. —A. C.

to another, who cannot take any portion of them without the consent of the owner of the surface. In such cases a hope of reciprocal advantage will bring about a compromise, advantageous to the parties and to the public.

Something has been said of a right to a reasonable support for the surface: but we cannot measure out degrees to which the right may extend; and the only reasonable support is that which will protect the surface from subsidence, and keep it securely at its ancient and natural level.

The defendant's counsel have argued that the analogy as to the [746] support to which one superficial close is entitled from the adjoining superficial close cannot apply where the surface and the minerals are separate tenements belonging to different owners, because there must have been unity of title of the surface and the minerals, and the rights of the parties must depend upon the contents of the deeds by which they were severed. But, in contemplation of law, all property in land having been in the Crown (1), it is easy to conceive that, at the same time, the original grant of the surface was made to one, and the minerals under it to another, without any express grant or reservation of any easement. Suppose (what has generally been the fact) that there has been in a subject unity of title from the surface to the centre: if the surface and the minerals are vested in different owners without any deeds appearing to regulate their respective rights, we see no difficulty in presuming that the severance took place in a manner which would confer upon the owner of the surface a right to the support of the minerals. If the owner of the entirety is supposed to have alienated the surface, reserving the minerals, he cannot be presumed to have reserved to himself, in derogation of his grant, the power of removing all the minerals without leaving a support for the surface; and, if he is supposed to have alienated the minerals, reserving the surface, he cannot be presumed to have parted with the right to that support for the surface by the minerals which it had ever before enjoyed. Perhaps it may be said that, if the grantor of the minerals, reserving the surface, seeks to limit the right of the grantee to remove them, he is acting in derogation of his grant, and is seeking to hinder the *grantee from doing what he [*747] likes with his own: but, generally speaking, mines may be profitably worked, leaving a support to the surface by pillars or ribs of the minerals, although not so profitably as if the whole of the minerals

(1) See per Lord WENSLEYDALE, in *Rowbotham* v. *Wilson* (1860) 8 H. L. C. at p. 360.—A. C.

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be removed; and a man must so use his own as not to injure his neighbour.

The books of reports abound with decisions restraining a man's acts upon and with his own property, where the necessary or probable consequence of such acts is to do damage to others. The case of common occurrence nearest to the present is, where the upper story of a house belongs to one man and the lower to another. The owner of the upper story, without any express grant, or enjoyment for any given time, has a right to the support of the lower story. If this arises (as has been said) from an implied grant or covenant, why is not a similar grant or covenant to be implied in favour of the owner of the surface of land against the owner of the minerals? If the owner of an entire house, conveying away the lower story only, is, without any express reservation, entitled to the support of the lower story for the benefit of the upper story, why should not an owner of land, who conveys away the minerals only, be entitled to the support of the minerals for the benefit of the surface?

I will now refer, in chronological order, to the cases which were cited in the argument; and I think that none of them will be found in any degree to impugn the doctrine on which our decision rests.

In *Bateson* v. *Green* (1) BULLER, J. says: "Where there are two distinct rights, claimed by different parties, which encroach on each other in the enjoyment of *them, the question is Which of the two rights is subservient to the other." And it was held that the lord may dig clay pits on a common, or empower others to do so, without leaving sufficient herbage for the commoners, if such right can be proved to have been always exercised by the lord. So, here, the right of the owner of the minerals to remove them may be subservient to the right of the owner of the surface to have it supported by them.

[*748]

Peyton v. *The Mayor, &c. of London* (2) was cited to show the necessity for introducing into the declaration an averment that the plaintiff was entitled to the easement or right which is the foundation of the action: but the easement there claimed was a right of support of one building upon another, which could arise only from a grant actual or implied; and there Lord TENTERDEN says: "The declaration in this case does not allege, as a fact, that the plaintiffs were entitled to have their house supported by the defendants' house, nor does it in our opinion contain any allegation from which

(1) 53 R. R. 99 (5 T. R. 411). (2) 33 R. R. 311 (9 B. & C. 725).

a title to such support can be inferred as a matter of law." In the case at Bar, we are of opinion that the declaration alleges facts from which the law infers the right of support which the plaintiff claims.

Wyatt v. *Harrison* (1) decided that the owner of a house, recently erected on the extremity of his land, could not maintain an action against the owner of the adjoining land for digging in his own land so near to the plaintiff's house that the house fell down: but the reason given is, that the plaintiff could not, by putting an additional weight upon his land, and so *increasing the lateral pressure upon [*749] the defendant's land, render unlawful any operation in the defendant's land which before would have caused no damage; and the Court intimated an opinion that the action would have been maintainable, not only if the defendant's digging would have made the plaintiff's land crumble down unloaded by any building, but even if the house had stood twenty years. Where a house has been supported more than twenty years by land belonging to another proprietor, with his knowledge, and he digs near the foundation of the house, whereby it falls, he is liable to an action at the suit of the owner of the house: *Stansell* v. *Jollard* (2) and *Hide* v. *Thornborough* (3). Although there may be some difficulty in discovering whence the grant of the easement (4) in respect of the house is to be presumed, as the owner of the adjoining land cannot prevent its being built, and may not be able to disturb the enjoyment of it without the most serious loss or inconvenience to himself, the law favours the preservation of enjoyments acquired by the labour of one man and acquiesced in by another who has the power to interrupt them; and, as, on the supposition of a grant, the right to light may be gained from not erecting a wall to obstruct it, the right to support for a new building erected near the extremity of the owner's land may be explained on the same principle.

In *Dodd* v. *Holme* (5), where there is a good deal of discussion respecting the rights of owners of adjoining lands or houses, no point of law was determined, as the case turned upon the allegation in the declaration that *the defendants dug "carelessly, negligently, [*750] unskilfully, and improperly," whereby "the foundations and walls" of the plaintiff's house "gave way." The plaintiff's house was

(1) 37 R. R. 566 (3 B. & Ad. 871).
(2) 1 Selw. N. P. 457 (11th ed.).
(3) 2 Car. & Kir. 250.
(4) See *Solomon* v. *Vintners' Co.* (1859) 4 H. & N. 598, 28 L. J. Ex. 376; and cf. *Dalton* v. *Angus* (1881) 6 App. Ca. 792, 827, 50 L. J. Q. B. 730, 749.—A. C.
(5) 40 R. R. 344 (1 Ad. & El. 493).

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proved to have been in a very bad condition; but Lord DENMAN said that the defendant had no right to accelerate its fall.

The Court of Exchequer, in *Partridge* v. *Scott* (1), concurred in the law before laid down in this Court, that a right to the support of the foundation of a house from adjoining land belonging to another proprietor can only be acquired by grant, and that, where the house was built on excavated land, a grant is not to be presumed till the house has stood twenty years after notice of the excavation to the person supposed to have made the grant: but nothing fell from any of the Judges questioning the right to support which land, while it remains in its natural state, has been said to be entitled to from the adjoining land of another proprietor. Some land of the plaintiff's not covered with buildings had likewise sunk, in consequence of the defendant's operations in his own land: but the Court, in directing a verdict to be entered for the defendants on the whole declaration, seems to have thought that the sinking of the plaintiff's land was consequential upon the fall of the houses, or would not have taken place if his own land had not been excavated.

The Judges in the Exchequer Chamber held, upon a writ of error from the Court of Common Pleas in *Chadwick* v. *Trower* (2), that the mere circumstance of juxtaposition does not render it necessary for a person who pulls down his wall to give notice of his intention [*751] *to the owner of an adjoining wall which rests upon it, and that he is not even liable for carelessly pulling down his wall if he had not notice of the existence of the adjoining wall: but this decision proceeds upon the want of any allegation or proof of a right of the plaintiff to have his wall supported by the defendant's, and does not touch the rights or obligations of conterminous proprietors, where the tenement to be supported remains in its natural condition.

Next comes the valuable case of *Harris* v. *Ryding* (3), which would be a direct authority in favour of the present plaintiff, if it did not leave some uncertainty as to the effect of the averment, in the declaration, of working "carelessly, negligently, and improperly," and as to whether the plaintiff was considered absolutely entitled to have his land supported by the subjacent strata, to whatever degree the affording of this support might interfere with

(1) 49 R. R. 578 (3 M. & W. 220).
(2) 54 R. R. 711 (6 Bing. N. C. 1); see *Trower* v. *Chadwick*, 43 R. R. 699 (3 Bing. N. C. 334).
(3) 52 R. R. 632 (5 M. & W. 60).

the defendant's right to work the minerals. There one seised in fee of land conveyed away the surface, reserving to himself the minerals with power to enter upon the surface to work them; and it is said to have been held that, under this reservation, he was not entitled to take all the minerals, but only so much as "could be got, leaving a reasonable support to the surface" (1). The case was decided upon a demurrer to certain pleas justifying under the reservation, and the declaration alleged careless, negligent and improper working, which there must be considered as admitted, whereas here it is negatived by the verdict; but the Barons, in the very comprehensive and masterly judgment which they delivered *seriatim*, seem all *to have thought that the reservation of the [*752] minerals would not have justified the defendant in depriving the surface of a complete support, however carefully he might have proceeded in removing them. Lord ABINGER says: "the plea is no answer, because it does not set forth any sufficient ground to justify the defendants in working the mines in such a manner as not to leave sufficient support for the land above, which is alleged by the declaration to be a careless, negligent, and improper mode of working them." PARKE, B. observes: it never could have been in the contemplation of the parties "that, by virtue of this reservation of the mines, the grantor should be entitled to take the whole of the coal and let down the surface, or injure the enjoyment of it:" and, again: "this plea is clearly bad, because the defendants do not assign that in taking away the coal they did leave a sufficient support for the surface in its then state." "The question is," says ALDERSON, B., "whether the grantor is not to get the minerals which belong to him, and which he has reserved to himself the right of getting, in that reasonable and ordinary mode in which he would be authorised to get them, provided he leaves a proper support for the land which the other party is to enjoy?" My brother MAULE, then a Judge of the Court of Exchequer, says, in the course of his luminous judgment: The right of the defendant's "to get the mines is the right of the mine-owners, as against the owner of the land which is above it. That right appears to me to be very analogous to that of a person having a room in a house over another man's room, or an acre of land adjoining another man's acre of land." PARKE, B., that he might not be misunderstood as to the right of the owner of the surface, afterwards *adds: [*753] "I do not mean to say that all the coal does not belong to the

(1) 52 R. R. 640 (5 M. & W. 70, 71).

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defendants, but that they cannot get it without leaving sufficient support." It seems to have been the unanimous opinion of the Court that there existed the natural easement of support for the upper soil from the soil beneath, and that the entire removal of the inferior strata, however skilfully done, would be actionable, if productive of damage by withdrawing that degree of support to which the owner of the surface was entitled, the duty of the owner of the servient tenement forbidding him to do any act whereby the enjoyment of the easement could be disturbed.

The counsel for the defendant cited and relied much upon the case of *Acton* v. *Blundell* (1), in which it was held that a land owner, who, by mining operations in his own lands, directs a subterraneous current of water, is not liable to an action at the suit of the owner of the adjoining land, whose well is thereby laid dry. But the right to running water and the right to have land supported are so totally distinct, and depend upon such different principles, that there can be no occasion to show at greater length how the decision is inapplicable.

We have now to mention the case of *Hilton* v. *Lord Granville* (2). A writ of error may probably be brought in this case when all the issues at fact have been disposed of; and nothing which I now say is to preclude me from forming any opinion upon it, should I ever hear it argued. If well decided, the plaintiff is justified in [*754] relying upon it; for it is strongly in point. This *Court there held that a prescription or a custom within a manor for the lord, who is seised in fee of the mines and collieries therein, to work them under any dwelling-houses, buildings and lands, parcel of the manor, doing no unnecessary damage, and paying to the tenants and occupiers of the surface of lands damaged thereby a reasonable compensation for the use of the surface of the lands, but without making compensation for any damage occasioned to any dwelling-houses or other buildings within or parcel of the manor by or for the purpose of working the said mines and collieries, is void as being unreasonable. Lord DENMAN, Ch. J. said: "a claim destructive of the subject-matter of the grant cannot be set up by any usage. Even if the grant could be produced in specie, reserving a right in the lord to deprive his grantee of the enjoyment of the thing granted, such a clause must be rejected as repugnant and absurd. That the prescription or custom here pleaded has this destructive effect, and is so repugnant and void, appears to us too

(1) 67 R. R. 361 (12 M. & W. 324). (2) 64 R. R. 604 (5 Q. B. 701).

clear from the simple statement to admit of illustration by argument."

The most recent case referred to was *Smith* v. *Kenrick* (1), in which the Court of Common Pleas, after great deliberation, held that it is the right of each of the owners of adjoining mines, where neither mine is subject to any servitude to the other, to work his own mine, as far as the flow of water is concerned, in the manner which he deems most convenient and beneficial to himself, although the natural consequence may be that some prejudice will accrue to the owner *of the adjoining mine; so that such prejudice does not [*755] arise from the negligent or malicious conduct of his neighbour. But no question arose there respecting any right to support; the controversy being only respecting the obligation to protect an adjoining mine from water which may flow into it by the force of gravitation. And in the very learned judgment of the COURT, delivered by my brother CRESSWELL, there is nothing laid down to countenance the doctrine that, in a case circumstanced like this which we have to determine, the owner of the minerals may, if not chargeable with malice or negligence, remove them so as to destroy or damage the surface over them which belongs to another.

We have attempted without success to obtain from the Codes and Jurists of other nations information and assistance respecting the rights and obligations of persons to whom sections of the soil, divided horizontally, belong as separate properties. This penury, where the subject of Servitudes is so copiously and discriminately treated, probably proceeds from the subdivision of the surface of the land and the minerals under it into separate holdings being peculiar to England. Had such subdivision been known in countries under the jurisdiction of the Roman civil law, its incidental rights and duties must have been exactly defined, when we discover the right of adjoining proprietors of lands to support from lateral pressure leading to such minute regulations as the following: "Si quis sepem ad alienum prædium fixerit, infoderitque, terminum ne excedito: si maceriam, pedem relinquito: si verò domum, pedes duos: si sepulchrum aut scrobem foderit, quantum profunditatis habuerint, tantum spatii relinquito: *si puteum, passûs latitudinem." Dig. [*756] Lib. X. Tit. I. (Finium regundorum) s. 13.

The Code Napoleon likewise recognizes the support to which the owners of adjoining lands are reciprocally entitled, but contains nothing which touches the question for our decision more closely

(1) 7 C. B. 515, 564.

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than the following article on "Natural Servitudes" (1). "Les fonds inférieurs sont assujettis, envers ceux qui sont plus élevés, à recevoir les eaux qui en découlent naturellement sans que la main de l'homme y ait contribué." "Le propriétaire supérieur ne peut rien faire qui aggrave la servitude du fonds inférieur." Code Civil, liv. ii. tit. iv. ch. i. art. 640. But reference is here made to adjoining fields on a declivity, not to the surface of land, and the minerals, being held by different proprietors.

The American lawyers write learnedly on the support which may be claimed for land from lateral pressure, and for buildings which have long rested against each other, but are silent as to the support which the owner of the surface of lands may claim from the subjacent strata when possessed by another. See Kent's Commentaries, Part vi. Lecture lii. vol. iii. p. 434, ed. 1840.

However, in Erskine's Institute of the Law of Scotland, treating of the servitude, *Oneris ferendi*, the very learned author has the following passage, which well illustrates the principle on which our decision is founded: "Where a house is divided into different floors or stories, each floor belonging to a different owner, which frequently happens in the city of Edinburgh," "the proprietor of the ground floor is bound merely by the nature and condition of his [*757] property, without any servitude, *not only to bear the weight of the upper story, but to repair his own property, that it may be capable of bearing that weight." "The proprietor of the ground story is obliged to uphold it for the support of the upper, and the owner of the upper must uphold that as a roof or cover to the lower." Book ii. tit. 9, s. 11 (2).

For these reasons, we are all of opinion that the present action is maintainable, notwithstanding the negation of negligence in the working of the mines; and that the rule to enter a verdict for the defendant must be discharged. We need hardly say that we do not mean to lay down any rule applicable to a case where the *prima facie* rights and liabilities of the owner of the surface of the land and of the subjacent strata are varied by the production of title deeds or by other evidence.

Rule discharged.

(1) "Servitudes qui dérivent de la situation des lieux."

(2) Vol. i. p. 433 (Ivory's ed. 1828).

REG. *v.* LORD (1).

1848.
July 12.

(12 Q. B. 757—765; S. C. 17 L. J. M. C. 181; 12 Jur. 1001.)

[757]

A contract by an infant, binding him to serve during a certain time for wages, but enabling the master to stop the work whenever he chooses, and to retain the wages during stoppage, is wholly void, as not being beneficial to the infant.

And, where a servant had been convicted (under stat. 4 Geo. IV. c. 34, s. 3) of absenting himself from service under such contract, this Court quashed the conviction.

J. W. HUDDLESTON, in Michaelmas Term, 1846, obtained a rule, absolute in the first instance, for a *certiorari* to bring up a conviction of James Lord under stat. 4 Geo. IV. c. 34, s. 3 (2).

The conviction, by three justices (Lancashire, 2nd October, 1846), set forth an information, laid before one of the justices by the manager for John Mason, of Rochdale, machine-maker, complaining that, on &c. *(29th July, 1846), at Castleton, in the county of [*758] Lancaster, James Lord, in consideration of Mason's agreeing to pay him certain wages, contracted with Mason to serve him as an artificer, &c. (reciting, in substance, the agreement after stated): And that the said James Lord, having accordingly entered into such service &c., did, afterwards, to wit on &c. (3rd August, 1846), at &c., and before the term of his said contract was completed, and whilst the same contract was subsisting, wilfully neglect to fulfil the said contract, to wit did unlawfully absent himself from the said service without the consent of the said J. Mason, or any lawful cause &c., against the form of the statute &c. The conviction then stated the apprehension of Lord under a warrant, and his appearance before the convicting justices; and that, having heard the charge, he declared that he was an infant under the age of twenty-one years. Whereupon the justices proceeded to examine into the complaint &c.: and a paper writing was produced by the informant before them, in the presence of Lord; which writing was as follows.

"An agreement made the 29th day of July, 1846, between John Mason, of" &c., "machine-maker, of the one part, and James Lord, of" &c., "of the other part. The said James Lord, for the consideration hereinafter expressed, agrees with the said J. M. that he, the said James Lord, according to the best of his skill and ability, shall and will, during the space of twelve months from the day of the date hereof, determinable as hereinafter mentioned,

(1) Dist. *Leslie* v. *Fitzpatrick* (1877) 3 Q. B. D. 229, 231, 47 L. J. M. C. 22; f. J. *Meakin* v. *Morris* (1884) 12 Q. B. D. 352, 355, 53 L. J. M. C. 72.—A. C.

(2) Repealed by 38 & 39 Vict. c. 86, s. 17. See now Employers and Workmen Act, 1875 (38 & 39 Vict. c. 90), ss. 4, 5, 6.—A. C.

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diligently and faithfully serve and employ himself, for the benefit of the said J. M., in the trade or business of a turner, either on common lathes or slide lathes, as the said J. M. may direct; and
[*759] *shall, at all times during the said term, observe and obey all the reasonable commands and directions of him, the said J. M.; and shall make himself generally useful in the workshop of his said master; and shall work fifty-eight and a half hours in each and every week of the said term; and shall not engage in any other business, or enter into the service of any other person. In consideration of which true and faithful service, he, the said J. M., agrees that he will, subject to the proviso next hereinafter contained, pay and allow unto the said James Lord, during the said term, as and for wages, the sum of 20*s.* per week: provided that, if the said James Lord shall be rendered in anywise incapable to perform his duty in the said service, or shall therefrom absent himself without his master's consent, or should the steam engine be stopped from accident or any other cause, then, in any of the said cases, the said J. M. may retain all weekly or other wages of him the said James Lord, during the term he shall so absent himself, or be incapacitated. Provided also that he, the said J. M., may dismiss and discharge the said James Lord from his said service at any time, and without any notice, in case of his so absenting himself or being guilty of any misbehaviour, misconduct or disobedience: and thereupon all his wages then due and unpaid shall become forfeited to the said John Mason, and this agreement shall become void and of no effect. As witness my hand, this 29th day of July, 1846." (Signed) "JAMES LORD." (Two witnesses.)

The conviction then set out the evidence in support of the charge, proving the execution of the contract by Lord, his entering into the service, and his absenting himself without leave: and also the
[*760] evidence of a witness, *Samuel Lord, who said: "I am father of the prisoner James Lord. He was born in August, 1828" (1). "Therefore, it manifestly appearing" &c.: the justices then proceeded to find James Lord Guilty, and to adjudge that he should be imprisoned &c., for three months, stating that they made no order as to his wages, inasmuch as it appeared to them, by the contract proved, "that there are not, nor will there be, for and

(1) It appears to have been assumed, from this evidence and the declaration of the convicted party before the justices (mentioned above), that the party was in fact an infant. The conviction did not otherwise show the fact: but it was deposed to in the affidavits upon which the rule for a *certiorari* was obtained.

during such time as the said James Lord shall be imprisoned," &c., "pursuant to this conviction, any wages of him, the said James Lord." REG. v. LORD.

The conviction having been returned, and an order for a *concilium* obtained, in last Hilary Term (1),

Huddleston was heard against the conviction:

The conviction is under stat. 4 Geo. IV. c. 34, s. 3. But the contract is voidable or void, the party being an infant. This point was raised, but not decided, in *Kitchen* v. *Shaw* (2). It will be argued that the contract binds the infant, as being for his benefit: even then, it would be voidable; and the act of the infant, in leaving the service, is an avoidance. It must, however, be admitted, as to the last point, that a contrary opinion was expressed in *Gray* v. *Cookson* (3). But, further, it is not true that the contract was for the infant's benefit. *His wages are to be retained by the master [*761] whenever the steam-engine is stopped; a contingency under the master's controul: and yet the servant is prohibited from entering into any other service. On the other hand, if the servant commit any disobedience, his wages are to be forfeited and the agreement is to be void. [He referred to *Pilkington* v. *Scott* (4), *Ayliff* v. *Archdale* (5), *Corpe* v. *Overton* (6), Co. Litt. 172 a, Com. Dig. Enfant (C. 2), *Keane* v. *Boycott* (7), judgment of EYRE, Ch. J., 2 Hawk. Pl. Cr. 39 (7th ed.), B. I. c. 64, s. 35, 1 Hale's Pl. C. 20, 4 Bac. Abr. 352 (7th ed.), tit. Infancy and Age (H), *Gylbert* v. *Fletcher* (8).] Another [762] objection is, that the agreement for service was not, according to stat. 4 Geo. IV. c. 34, s. 3, "signed by" both "the contracting parties." (On this point the Court dispensed with any argument on the other side, Lord DENMAN, Ch. J. observing that, by the words of sect. 3, signature by the parties was necessary in the case only of an information for not entering into the service according to agreement (9).)

Cowling, contrà:

The agreement is neither void nor unreasonable. First, it would

(1) January 19th. Before Lord Denman, Ch. J., Patteson, Coleridge and Wightman, JJ.

(2) 6 Ad. & El. 729, 732, 733.

(3) 16 East, 13, 27, 28. *Rex* v. *Ferred*, there cited on the point, is in Cald. p. 26.

(4) 71 R. R. 781 (15 M. & W. 657).

(5) Cro. Eliz. 920.

(6) 38 R. R. 422 (10 Bing. 252; see p. 257).

(7) 3 R. R. 494 (2 H. Bl. 511, 514).

(8) Cro. Car. 179.

(9) Some further objections to the contract, and to the conviction in other respects, were urged; but on these it became unnecessary to decide.

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be a binding contract in the case of an adult. The master's agreement is, primarily, to employ the servant for twelve months at certain wages; and its character in this respect is not altered by the proviso. [He cited *Pilkington* v. *Scott* (1), *Hartley* v. *Cummings* (2), and *Williamson* v. *Taylor* (3).] Here the master was bound to employ the servant through the twelve months if the special circumstances mentioned in the proviso did not occur.

[763]

(WIGHTMAN, J.: The servant could not work for any other person; but his wages might be withheld for any length of time during which the engine was stopped.

LORD DENMAN, Ch. J.: By "accident or any other cause.")

Secondly, assuming that the contract would have bound an adult, it was beneficial enough to bind an infant. The general rule is that "an infant cannot do an act apparently to his prejudice: as, he cannot make a lease, not rendering rent; for such lease shall be void:" Com. Dig. Enfant (C 2). It must be apparent to the Court that the contract is not for his benefit; otherwise it ought to be enforced: *Maddon* v. *White* (4) is an instance. * * That a contract for hiring and service is *primâ facie* beneficial to an infant, was assumed by BAYLEY, J. in *Rex* v. *Chillesford* (5); and the proposition is recognised by *Lord ABINGER and ALDERSON, B. in *Wood* v. *Fenwick* (6).

[*764]

(WIGHTMAN, J.: Here the terms are such that the master may, possibly, pay no wages at all. An adult may make a contract which is not beneficial to himself.)

Contracts like the present are common in the north of England. It is true that an infant cannot bind himself in a penalty; and the proviso here, as to loss of wages, may be thought penal: but, even if that be so, the contract may be bad so far, but good in other respects.

Huddleston, in reply. * * *

Cur. adv. vult.

(1) 71 R. R. 781 (15 M. & W. 657).
(2) 5 C. B. 247.
(3) 5 Q. B. 175.
(4) 1 R. R. 453 (2 T. R. 159).
(5) 4 B. & C. 94. The learned Judge there added that the infant, "if he does not perform his contract," "will be liable to the statutable regulation applicable to masters and servants."
(6) 10 M. & W. 195, 204.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT: REG. v. LORD.

The question arose on conviction of a servant for unlawfully absenting himself from his master's employment. Among many objections, one appears to us clearly fatal. He was an infant at the time of entering *into the agreement, which authorises the master [*765] to stop his wages when the steam-engine is stopped working for any cause. An agreement to serve for wages may be for the infant's benefit: but an agreement which compels him to serve at all times during the term, but leaves the master free to stop his work and his wages whenever he chooses to do so, cannot be considered as beneficial to the servant. It is inequitable and wholly void. The conviction must be quashed.

Rule absolute.

POLLOCK *v.* STABLES.

1848. *Feb.* 9.

(12 Q. B. 765—775; S. C. 17 L. J. Q. B. 352; 12 Jur. 1043; 5 Rail. Cas. 352.)

[765]

If a party authorises a broker to buy shares for him in a particular market, where the usage is that, when a purchaser does not pay for his shares within a given time, the vendor, giving the purchaser notice, may resell, and charge him with the difference; and the broker, acting under the authority, buys at such market in his own name; the broker, if compelled to pay a difference on the shares through neglect of his principal to supply funds, may sue the principal for money paid to his use.

And it is not necessary, in such an action, to show that the principal knew of the custom.

ASSUMPSIT: 1, for money paid; 2, for work and labour and commission; 3, on an account stated.

The plaintiff, by his particulars of demand, claimed 85*l.*, being the difference paid by plaintiff for defendant in respect of ten Huddersfield and Manchester Railway shares, contracted to be purchased by plaintiff for defendant, on or about 3rd September, 1845; also 3*l.* 15*s.* for brokerage due to plaintiff from defendant on the said transaction.

Pleas: 1. *Non assumpsit;* issue thereon; 2. A set-off, which was denied by the replication; issue thereon.

On the trial, before Alderson, B., at the Yorkshire Spring Assizes, 1847, the evidence for the plaintiff was that, on 3rd September, 1845, a person named Hogg, *then an authorised agent of the [*766] defendant, directed the plaintiff, who was a sharebroker in Leeds, and a member of the Leeds Sharebrokers' Association, to purchase for defendant ten shares in the Huddersfield and Manchester Railway, as scrip, the shares being then unregistered. The plaintiff

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bought the shares accordingly, in his own name, at 28*l.* per share, received the scrip from the vendor, and, on the same day, sent to defendant the following note.

"3rd September, 1845. Bought you ten shares in the Huddersfield and Manchester Railway, at 28*l.* per share. For Mr. Stables, Leeds. Brokerage 5*s.* per share."

The defendant, on 5th September, sent the following letter to the plaintiff.

"LEEDS, 5th September, 1845.

"GENTLEMEN,—Mr. John Denison, of Yeadon, the party for whom the ten shares in the Huddersfield and Manchester Railway were purchased, has neglected to come down to Leeds to-day, according to his promise to do so: but I have just seen some of his friends, who inform me that he will be here to-morrow without doubt, and that the scrip will be taken up during the forenoon. In the meantime, I beg to express my regret that through this person's neglect both you and others, as well as myself, should be so greatly inconvenienced. I remain" &c. "GEO. STABLES."

"Messrs. R. POLLOCK & Co.

"Stock and Sharebrokers, Bond Street, Leeds."

The defendant not having taken up the shares, the plaintiff, about
[*767] 5th of September, sent the scrip back to *the vendor, who thereupon gave plaintiff notice that the shares would be sold out against him. There was some evidence that this proceeding was conformable to the custom of the Leeds Sharebrokers' Association. Whether or not the defendant was acquainted with such a custom did not distinctly appear: nor was it shown that he received any notice of the vendor's intention to sell. On 10th September, which appeared to be the day when, according to the usage of the Leeds Exchange, a vendor under such circumstances was entitled to sell against the vendee, the ten shares were, by the vendor's direction, sold out, at 19*l.* 10*s.* per share, by the secretary of the Sharebrokers' Association, who, on the same day, gave notice thereof to plaintiff: and plaintiff, on 11th September, gave notice thereof to defendant, claiming the balance. The registration of the shares took place shortly after. The balance of 85*l.* (8*l.* 10*s.* per share) was afterwards allowed by plaintiff to the vendor on a settlement of accounts between them.

For the defendant it was contended that Hogg was not his agent: and, further, that, at any rate, the action for money paid could not

be supported. The learned Judge was inclined to think the latter objection valid: he directed the jury to find for the plaintiff, giving the amount of commission only, if they thought that Hogg was authorized by the defendant: and he reserved leave to the plaintiff, in that event, to move to increase the damages by 85*l*. Verdict for defendant on so much of the issue on *non assumpsit* as respected the first count; on the other issues, for plaintiff: damages 2*l*. 10*s*.

In Easter Term, 1847, *Baines* obtained a rule *nisi* to *increase the damages by 85*l*. (1). In last Hilary vacation (2),

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Watson and *Pashley* showed cause:

To support an action for money paid, there must have been a request, express or implied, on the part of the defendant (3). Here the plaintiff, on making the contract, sent notice of it to his principal, the defendant, and did not receive any authority from him to pay the vendor. A broker who, in contracting, gives the name of his principal is not personally liable; and, it may be gathered from the evidence that the plaintiff did so contract in this instance. Then, if he paid the vendor without a special request from his principal, that party is not liable.

(COLERIDGE, J.: It does not appear that the documents afforded evidence of a principal having been named.

WIGHTMAN, J.: *Primâ facie*, the broker was liable. The question is, upon what terms the parties were dealing at the time of the purchase.

COLERIDGE, J.: The advice note sent to the defendant afterwards cannot alter the state of things.)

It may show the previous understanding.

(PATTESON, J.: The note sent to the principal did not purport to be a representation of the contract between the broker and vendor.

(1) The rule was so drawn up; but the case was argued in Banc, without objection, on the question whether the plaintiff was entitled to a verdict on the count for money paid.

(2) February 9th. Before Lord Denman, Ch. J., Patteson, Coleridge and Wightman, JJ.

(3) On this point, *Bowlby* v. *Bell*, 3 C. B. 284, was mentioned, but admitted to be distinguishable: and *Baines*, in supporting the rule, observed that the broker in that case had acted against an express prohibition by his principal, in paying the money.

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WIGHTMAN, J.: If, at the sale, the broker had made himself liable, what did it matter whether *the principal was told of it afterwards or not?)

He might have deprived the broker of any supposable authority to pay on his behalf. The alleged custom in this case can have no weight if the defendant was not liable by the terms of the contract of purchase: *Trueman* v. *Loder* (1), where this Court strongly disapproved of the attempt to qualify an agreement by reference to a supposed custom. In 2 Greenleaf on Evidence, 207, s. 251, 3rd ed. Boston, 1846, it is said that "many Judges" of the American Courts "are of opinion" that usages of trade "should be sparingly adopted by the Courts, as rules of law" (2); and he adds that, on the principle upon which these usages are made evidence, "the usage or habit of trade or conduct, of an individual, which is known to the person who deals with him, may be given in evidence to prove what was the contract between them." At least, where the usage is not so known, it ought not to be deemed part of the contract. It is not clear what is meant by a custom of Leeds. The Association referred to is only a certain number of the mercantile men of the place.

(WIGHTMAN, J.: You might make the same objection to a mercantile custom of London.)

It was not shown that the authority given to the broker bound him to purchase at Leeds. The proof as to usage was very slight.

(LORD DENMAN, Ch. J.: No objection seems to have been raised on the absence of proof.

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COLERIDGE, J.: The *question seems really to turn on the general liability of a broker to pay if he buys in his own name.)

There is more claimed in this case than would result from the common law liability. The principal is to be made answerable for a difference on resale.

(1) 52 R. R. 451 (11 Ad. & El. 589, 597). See also the authorities cited, *ibid.*, 52 R. R. 459, note (2) (11 Ad. & El. 600, note (*b*)).

(2) See 2 Stark. Ev. 360—362, 3rd ed., where this subject is very fully discussed. Also 2 Taylor on Evidence, 771—774, ss. 845, 846. And, as to the expediency of applying usage to the construction of contracts, and the opinion of English Judges on that subject, *Anderson* v. *Pitcher*, 5 R. R. 565 (2 Bos. & P. 164, 168), judgment of Lord ELDON.

(WIGHTMAN, J.: Assuming that the defendant knew of the custom, it may be a question whether he ought not to have had notice that the shares were about to be resold.)

That is so. Where perishable commodities are resold adversely to a purchaser, the vendor must give notice. The principal here was not bound to conclude that there would be a resale. The vendor had an option as to reselling, and might not have taken that course. The broker might not have chosen to insist upon the principal's liability. If, indeed, the broker had told the principal that his shares were going to be resold, and the principal had then not interfered, it might have been inferred that he authorised the broker to pay the difference.

(COLERIDGE, J.: You say that, although the principal, if he had notice, might wish to keep the shares, he may lose the option if the seller gives notice to the broker only?)

That is his situation. And, under such circumstances, the broker cannot maintain an action for money paid, and put the principal to a cross action for loss occasioned by the omission to give notice of resale.

(PATTESON, J.: At any rate the first default that led to the loss was the defendant's.)

It does not appear to have been ever decided that, in a case like this, the principal is bound by a custom of which he has no notice. In *Scott* v. *Irving* (1), where the question arose on a settlement between an insurance broker (Mitchell) and underwriters, *PARKE, J. said: "Mitchell" "was the agent of the assured to receive payment from the underwriter in cash, or that which was equivalent to payment in cash. A special authority may be given by the assured to the broker to receive payment in some other mode, and such authority may be inferred from facts, or from some usage to which the assured has assented: and here there is some evidence of a usage prevailing between the broker and the underwriter; but the plaintiff was not cognizant of that usage, for he states, in one of his letters, that this was the first total loss he ever had experienced. That being so, the general authority will not enable the broker to set off a private debt of his own, namely, the sum [*771]

(1) 35 R. R. 396 (1 B. & Ad. 605, 614).

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due to the underwriter for premiums, against the debt of the underwriter to the assured." That case was not noticed in *Bayliffe* v. *Butterworth* (1), which will be relied upon here in support of the rule.

(COLERIDGE, J.: In the present case the endeavour is to fix the defendant with a collateral liability arising from the contract between the two brokers. Then is not the real question, what authority the defendant originally gave to his broker? whether, by the general commission to purchase, he empowered the broker to buy under the liabilities usual in the Leeds market, though unknown to the principal himself; and whether, in fact, the broker dealt according to the course of the market.)

Baines and *T. F. Ellis, contrà:*

The action for money paid clearly lies, according to the rule laid down, and to the decision, in *Brittain* v. *Lloyd* (2). The case is like
[*772] that of a surety, who, if compellable to pay the *whole debt and called upon to do so, may sue the principal for money paid, though the payment was not made by his desire: 1 Selw. N. P. 76, 11th ed. (3). The plaintiff was requested by the defendant to make a contract for him: what contract, was a question for the jury; and their finding establishes that the contract he did make was authorised by the defendant. By that he bound himself personally, according to the general usage of brokers, which the Court will notice: the mode of that liability was defined by the rules of the Leeds Association, to which the broker belonged: and, by one of these rules, if he did not take up the shares within a certain time, the vendor, on giving him notice, might sell them out and charge him with the loss on such resale. When the plaintiff should have taken up the shares, the defendant was not prepared to supply funds; the vendor, therefore, gave the plaintiff notice according to the rules of the Association, and resold the shares. The defendant was bound by those rules, and the proceeding upon them; for it is established by *Sutton* v. *Tatham* (4) and *Bayliffe* v. *Butterworth* (1) that a principal, employing a broker to deal where a certain usage prevails, impliedly authorises him to deal according to that usage.

(WIGHTMAN, J.: Your difficulty is that you did not give the

(1) 74 R. R. 702 (1 Ex. 425).
(2) 69 R. R. 816 (14 M. & W. 762).
(3) Citing *Exall* v. *Partridge*, 4 R. R. 656 (8 T. R. 308, 310).
(4) 50 R. R. 312 (10 Ad. & El. 27).

defendant notice that the shares were about to be resold, your action being for the difference of price on resale.)

The defendant's letter of September 5th shows that his default could not be attributable to any want of notice. Upon that default, the vendor's right to resell was irrevocably vested: and, therefore, after the time had expired *within which the broker's contract with [*773] the vendor ought to have been completed, nothing that the principal could have done would have changed the legal position of the parties. The point now suggested from the Bench was not taken at the trial, where the defect, if important, might have been supplied; nor was it raised in *Bayliffe* v. *Butterworth* (1). (Reference was here made to the Judge's note in the present case: and it did not appear that the point was specifically made at Nisi Prius.) It was sufficient, as between the broker and his principal, that the broker had done, as between him and the vendor, that which usage requires between brokers, and had duly advised his principal of the contract; though indeed the communication he made to his principal could not vary his original liability as a broker purchasing in his own name. If the jury had thought that the defendant had neglected his duty to his principal, they would not have found him entitled even to commission. The present claim stands independent of any custom: the broker, having been authorised to contract in his own name, and to pay the money on his principal's default, was entitled to recover the amount from him.

LORD DENMAN, Ch. J.:

We will communicate with my brother ALDERSON.

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

This was an action of assumpsit for money paid and *for com- [*774] mission. At the trial, it appeared that the plaintiff, a sharebroker at Leeds, bought for the defendant, by his directions, ten shares in the Huddersfield and Manchester Railway at 28*l.* a share, to be paid on delivery of scrip. The defendant not being ready to pay when the scrip was delivered to the plaintiff, the vendors demanded the money or the scrip of the plaintiff, who delivered the scrip back, which had fallen in price; and, according to the custom of the Stock Exchange at Leeds, the vendors sold the shares for the

(1) 74 R. R. 702 (1 Ex. 425).

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then market price, and called upon the plaintiff to pay the difference, which he did according to the usage. The present action was brought to recover the money so paid, amounting to 85*l.*, and also commission upon the original purchase. The jury found a verdict for the plaintiff for 2*l.* 10*s.* in respect of the commission; but, under the direction of the learned Judge, who was disposed to think that an action for money paid was not maintainable, found a verdict for the defendant upon the count for money paid (1), with liberty for the plaintiff to move to enter a verdict upon that count with 85*l.* damages, in case the Court should be of opinion that the plaintiff was entitled to recover the amount paid by him for loss upon the transaction, and that it was recoverable under the count for money paid.

The case of *Bayliffe* v. *Butterworth* (2), reported in 1 Exch. Rep., is not, we think, distinguishable in principle from the present. It was there held by the Court of Exchequer that, under circumstances very similar to those in the present case, an action for money paid [*775] *was maintainable by a sharebroker against his principal, where the former was, by the custom of the share market in which he dealt, obliged to make good deficiencies occasioned by the default of his principal; and that the latter must be considered as dealing with his broker according to the usage of the market in which he deals; and that a contract according to such usage was equivalent to a request to the broker to pay the deficiency if the principal failed to do so himself. This decision is in accordance, as far as the circumstances are parallel, with the case of *Sutton* v. *Tatham* (3). We are therefore of opinion that the rule should be made absolute to enter a verdict for the plaintiff, on the count for money paid, for 85*l.*

Rule absolute (4).

(1) See *ante*, pp. 420, 421.
(2) 74 R. R. 702 (1 Ex. 425).
(3) 50 R. R. 312 (10 Ad. & El. 27).
(4) See *M'Ewen* v. *Woods*, 75 R. R. 274 (11 Q. B. 13).

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1848.
Jan. 19.
July 12.

(12 Q. B. 775—785; S. C. 17 L. J. Q. B. 326; 12 Jur. 973; 5 Rail. Cas. 669.)

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Under the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, if the promoters of an undertaking demand a compulsory sale of premises by authority of the statute, the owner, by sect. 92, may refuse to sell less than the whole: but, if they have given notice of requiring a part, the owner cannot, by reason of such notice, require that the whole be taken; and the promoters, on his refusal to sell part, may abandon the purchase.

MANDAMUS to the above-named Company. "Whereas, since the passing and coming into operation of the London and South-Western Railway Metropolitan Extensions Act (1), 1845, we have been given to understand" &c. "that John Henry Coward *and [*776] Ellis Cancellor, starch manufacturers, have been for several years past, and were at the date and at the time of the giving of the notice next hereinafter mentioned, sent and given by you" &c., "and now are, the lessees of a certain manufactory and premises situate in or near to" &c. "in the county of Surrey, commonly known by the name and style of the Lambeth Starch Manufactory, under a certain lease bearing date" &c., "and that the said J. H. C. and E. C. had, together with one Thomas Bailey Illidge, for some years past and at the date and the giving of the notice aforesaid, carried on, and still do occupy, the said manufactory, and carry on in the same the trade of starch manufacture as copartners therein, and have a joint interest therein and in the said manufactory and premises: And whereas we have also been given to understand" &c. "that you, the said Company, being the promoters, according to the Lands Clauses Consolidation Act, 1845 (2), of the undertaking mentioned in the said first mentioned Act of Parliament, required to purchase and take the lands and premises hereinafter mentioned, and which you are authorized to purchase and take by the statute in that case" &c.; "and that you, upon" &c. (14th May, 1846), "gave notice thereof to the said J. H. C. and E. C., and all other persons whom it might concern; and that you by such notice did demand from them the particulars of their estate and interest in such lands and premises, and of the claims made by them in respect thereof; and which notice also stated the particulars of the said lands and premises, and had annexed thereto a plan of the said lands and premises; and that you, the *said [*777] Company, were willing to treat for the purchase of the said lands

(1) 8 & 9 Vict. c. clxv., local and personal, public.

(2) 8 & 9 Vict. c. 18.

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and premises, and as to the compensation to be made to the said parties, to whom such notice was so given as aforesaid, for the damage that might be sustained by them by reason of the execution of the said works mentioned in the said first mentioned statute: And whereas we are also given to understand" &c. "that the said lands and premises mentioned in the said notice, and which you required by such notice to purchase and take, were a part only of the said manufactory and premises known by the name and style of the Lambeth Starch Manufactory; and that the said J. H. C. and E. C. and T. B. I. were willing and able and ready to sell and convey to you their estate and interest in the whole of the same manufactory and premises known by the name" &c.; "whereof you, within twenty-one days after the service of the said notice, to wit on" &c. (4th June, 1846), "had notice that they then required you to purchase and take their said estate and interest in the whole of the said manufactory and premises known by the name" &c., "as you were by law then bound to do: And you and the said J. H. C. and E. C. and T. B. I. did not then, and have not, although more than a reasonable and proper time for this purpose has long since elapsed, as yet agreed as to the amount of purchase money, compensation and damage to which they are by law entitled by force of the statute" &c.; "and by reason of the premises the same has always been and still is in dispute:" The writ then stated that the purchase money, compensation and damage claimed exceeded 50*l.*, and amounted to 8,000*l.* purchase money, and 35,000*l.* damage by the execution of the works; that [*778] J. H. C., *E. C., and T. B. I. had thereupon required the Company to issue their warrant according to the statute, to summon a special jury to try the said question of disputed compensation, and that the Company had neglected and refused for an unreasonable time so to do: And it commanded the Company to issue their warrant to the sheriff to nominate and summon such jury in manner directed by the Lands Clauses Act for the purpose of assessing the purchase money, compensation and damage to which the prosecutors were entitled under the statute "in respect of their said estate and interest, as well in the said lands and premises mentioned in the said notice as in the remaining part of the said manufactory and premises known by the name and style of the Lambeth Starch Manufactory:" or that they should show cause &c.

The defendants made a return, alleging, among other things, that the premises which they had been required to take consisted

of a dwelling house with offices, a counting-house, cart sheds, &c., gardens, a greenhouse, premises which had been piggeries, &c., together with a building of one story used in the manufacture of starch, with a mill or engine house and drying room and warehouses attached thereto; and statements, not now material, were added, to show that some of the enumerated premises were not valuable and were not in fact part of the starch manufactory. The return further stated that the Company gave notice of purchasing and taking the messuages, lands and hereditaments described in a schedule to the notice as "so much of the ground, stabling, coach house, factory and sheds as are coloured red on the plan hereunto annexed:" but that the prosecutors, by their notice of claim transmitted *in answer, proposed to sell not only the premises [*779] coloured red, but all their premises as shown in the plan, to which they referred in detail; describing the premises as "leasehold under Thomas Lett," &c. "for the term of fourteen years from the 24th day of June, 1833:" and they claimed the amount of purchase money and compensation stated in the writ: Whereupon the Company "did wholly abandon and give up all intention of purchasing the estate" &c. of the prosecutors in the premises; and they had ever since been in the peaceable and undisturbed possession of the whole, and would remain undisturbed by the Company until the expiration of their interest.

The prosecutors pleaded to the return, taking issue, to the country, on a part not above set forth (1), and demurring specially to the residue. The defendants joined in demurrer, and demurred specially to that part of the plea which concluded to the country. The judgment of the COURT makes any further statement of the pleadings unnecessary.

The case was argued last Hilary Term (2).

Martin, for the Crown:

The question as to the *mandamus* itself turns on stat. 8 & 9 Vict. c. 18, ss. 18 and 92. The defendants allege that the writ is unwarranted, because they, having claimed part only of the premises, are not bound to take the whole. The clauses providing for the purchase of lands otherwise than by agreement must be interpreted favourably to private persons, and strictly as against the Company, who are exercising a general power for their own pecuniary benefit. The Company, when they gave their notice, made an [*780]

(1) See p. 433, *post*.

(2) January 19th. Before Lord Denman, Ch. J., Patteson, Coleridge and Wightman, JJ.

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option which was conclusive upon themselves: *Rex* v. *The Hungerford Market Company* (1); they must take all that they have given notice of taking: *Stone* v. *The Commercial Railway Company* (2); and they must, in that respect, abide by such terms as the Act annexes to the notice they have given. Lord COTTENHAM, L. C. says, in *Salmon* v. *Randall* (3): "The parties, I conceive, are put into the situation of vendor and purchaser by the notice; and like every other vendor and purchaser, they must of course complete their purchase, according to the provisions, not of the contract, but of those arrangements which the Act of Parliament has substituted in lieu of the contract, in a case where no contract can take place." Sect. 85 enables the promoters of undertakings to take the land required without waiting for an agreement, award or verdict: and there are other clauses bearing very rigorously on land owners. Promoters also ought to be bound with great strictness. By their notice, independently of any further proceedings, they, as Lord COTTENHAM points out in the case last cited (4), at once acquire an interest in the premises under the Act of Parliament, as purchasers; and the terms (as to what shall be taken) are fixed by sect. 92, which enacts that no person shall be required to sell or convey a part only, if willing and able to sell and convey the whole. The operation of a notice being final, it must be taken that the promoters, when they served it, had ascertained whether the subject-matter of notice was part or the whole, and how far it would be convenient to take the whole. At any rate, there should be a peremptory *mandamus* to have compensation *assessed for part. (The arguments on other points are omitted, the judgment not having turned upon them.)

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Hill, contrà:

The object of the clauses relating to purchase otherwise than by agreement was to put parties, forced to sell, in the same situation as those who sold by contract before the compulsory power accrued. If the Company here had given no notice, and had entered into a contract for purchasing only a part, they clearly would not have been obliged to purchase the whole; the vendors would not have been bound to sell the whole; the rights and claims would have been reciprocal. And this state of things is not altered by the

(1) 38 R. R. 253 (4 B. & Ad. 327).
(2) 48 R. R. 32 (4 My. & Cr. 122).
(3) 45 R. R. 306 (3 My. & Cr. 439, 449).
(4) 45 R. R. 313 (3 My. & Cr. 450).

statute. What the promoters give notice of taking, they are bound to take, and the land owner to give: the Act does not oblige them to take more than it obliges him to give: the parties are bound alike, as in the case of contract. Sect. 92 merely exempts the owner from the necessity of selling, if the promoters will not accept all: and, where they have no power to compel, no compulsion is placed upon them. In none of the decided cases have Companies been held bound to purchase that of which they could not enforce the sale. The interest for which the owner is to claim must be exactly that for which the notice binds: this principle is recognised by Lord COTTENHAM, L. C. in *Stone* v. *The Commercial Railway Company* (1): and, if the land owners will not give effect to the notice, they remain in the same situation as if none had been given: *Reg.* v. *The London and Southampton Railway Company* (2). The case of *Reg.* v. *The London and Greenwich Railway Company* (3) *bears some resemblance to the present, and is in favour of the defendants (4). No argument can be founded on sect. 85, which only enables the promoters to take possession on lodging a fair amount for value of compensation if the lands are taken before there can be an agreement, verdict or award. The principle relied upon as governing the construction of statutes obtained by particular Companies will not apply to the Lands Clauses Consolidation Act, which is public and general. The Court cannot now grant a peremptory *mandamus* as to part of these premises; and it does not appear by the writ that the Company gave notice of taking (as is said in sect. 92) "a part" "of any house or other building or manufactory;" or that the prosecutors ever required them, or that the Company ever refused, to take a part of the premises in question.

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Martin, in reply:

Reg. v. *The London and Greenwich Railway Company* (5) was decided on grounds which do not exist here.

(WIGHTMAN, J.: The argument here is that, if you dissent from what the Company propose, and offer something else, they are not bound.)

The effect of sect. 92 does not depend upon consent or dissent.

(1) 48 R. R. 32 (4 My. & Cr. 122, 125, 126).

(2) 50 R. R. 306 (10 Ad. & El. 3).

(3) 61 R. R. 186 (3 Q. B. 166). *Hall* referred to the judgment of PATTESON, J.

(4) *Walker* v. *The London and Blackwall Railway Company*, 61 R. R. 388 (3 Q. B. 744), was also mentioned, but admitted to have no material bearing on this case.

(5) 61 R. R. 186 (3 Q. B. 166).

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(PATTESON, J.: *Mr. Hill* says that there is no contract till you assent to give either part or the whole.)

It is not a case of contract, but of purchase "otherwise than by agreement" (1). By the giving of notice, the *Company acquired an absolute power to take, and were bound to take as sect. 92 prescribes: a part had become their's; and they could not decline accepting the whole.

[*783]

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

This was a *mandamus* to issue a precept for summoning a jury to assess compensation for a starch manufactory and premises, and for damage thereto done; of which premises the defendants had given notice, on the 14th May, 1846, of their demanding to purchase a part; but the prosecutors gave the defendants notice that they required them to purchase the whole.

The return was: That the undertaking is highly beneficial to the public, and will cost half a million of pounds to the defendants. This is perfectly immaterial. That the prosecutors hold under a lease which will expire June 24th, 1847: That the prosecutors, at the time of notice, had no greater estate than as tenants from year to year: That the premises comprise, not only a place of business, but two gardens, said to be unused, and a greenhouse and two piggeries extremely dilapidated and not necessary for carrying on the manufacture; which also appears irrelevant to the question. That the defendants' notice of 14th May, 1846, gave notice of purchasing the property under the following description: "So much of the ground, stabling, coach house, factory and sheds as are coloured red in the plan hereunto annexed:" but that the prosecutors preferred their claim, not only for that part, but for the whole within the boundary line in the plan, and required 8,000*l.* for the purchase money, and 35,000*l.* for the damage, *otherwise that a jury should be summoned: none of which particulars, beyond the defendants' wish to purchase a part, and the prosecutors' that they should purchase all, appear important.

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That, thereupon, the defendants abandoned their intention of purchasing (not saying how or when, or that they gave the prosecutors notice of abandonment); and the prosecutors remain

(1) Stat. 8 & 9 Vict. c. 18: heading of the series of clauses beginning with sect. 16.

in peaceable possession for the remainder of their term; therefore they cannot and ought not to issue warrant &c.

To that part of the return in which the defendants aver that the prosecutors had no greater interest than as tenants from year to year, the defendants plead, denying it in the same terms, and put themselves upon the country; and to the residue of the return they demur for several causes. 1. That the description given by the prosecutors of the premises is an argumentative traverse of their being all one whole manufactory. 2. For some of the objections above mentioned to their allegation of abandonment. The prosecutors join in demurrer, and in their turn demur to the plea as raising an immaterial issue.

In addition to all these points, the writ was objected to as bad, because it claims assessment for the value of the entire premises, when the Company has required a part only.

The claim is founded on the Lands Clauses Consolidation Act. But, on examination of the sections which were supposed to give this right, namely the 18th and 92nd, there is not the smallest pretence for an argument to that effect. Section 18 gives directions as to the notice to be given by the Company requiring lands, and provides that "every such notice shall state the particulars of the lands so required, and that the *promoters of the undertaking are [*785] willing to treat for the purchase thereof, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the works." This has been done, as appears by the writ itself: and, assuming for the sake of the argument that the prosecutors' premises are one entire manufactory, the notice requires only a part.

The other section, 92, enacts "that no party shall at any time be required to sell or convey to the promoters of the undertaking a part only of any house or other building or manufactory, if such party be willing and able to sell and convey the whole thereof." The writ states that the prosecutors were willing and able to sell and convey the whole, and gave notice and required the Company to take the whole. Now the 92nd section, though it protects the owners from being obliged to sell a part, does not contain any words making it obligatory on the Company, who only want a part, to take the whole, as some other Acts of Parliament do: and therefore the writ, which is founded entirely on such a supposed obligation on the part of the Company, manifestly cannot be sustained.

REG. v. LONDON AND SOUTH-WESTERN RAILWAY COMPANY.

This simple point decides the case for the defendants, and shows that the writ must be quashed. We have to lament the waste of time that has ensued from the obscurity thrown about the case by the superfluous matter foisted into the record.

The learned counsel for the prosecution contended, as a last resource, that the *mandamus* might go for a part, though it claims the whole. This is impossible, for that reason; and also because no claim has ever been made in respect of a part.

Judgment for defendants.

1848. *Nov.* 9.

[871]

LOCK *v.* ASHTON.

(12 Q. B. 871—877; S. C. 18 L. J. Q. B. 76; 13 Jur. 167.)

Trespass for an assault and false imprisonment. Defendant had given plaintiff into custody and had him taken to a police office on a charge of felony. The magistrate heard the charge and remanded the prisoner. On a subsequent examination he was discharged, it being then discovered that the charge had been made under a mistake. The declaration charged the carrying the plaintiff in custody before a magistrate, and the remand, as distinct acts of trespass; and the jury gave damages for both:

Held, that damages could not be given for the remand, which was the judicial act of the magistrate, and therefore not the subject of an action of trespass against the defendant. New trial granted.

TRESPASS. The declaration charged that defendant with force and arms assaulted plaintiff, and compelled him to go in custody to a police station, and imprisoned him there for a long time &c., at the expiration of which time defendant compelled plaintiff to go in custody to a police court, and there kept him imprisoned for a long time &c., at the expiration of which defendant forced plaintiff to go as a prisoner from the police court to a prison, and there imprisoned him for a long time &c., at the expiration of which defendant again &c.; the count then alleged in like manner a second taking of plaintiff as a prisoner to the police court, detention there, reconveyance in custody to the prison, and further imprisonment there; and a third taking to the police court and detention there; under a false pretence that he had been guilty of felony. Plea: Not guilty.

On the trial, before Lord Denman, Ch. J., at the sittings in Middlesex after last Hilary Term, it appeared that the plaintiff, being servant to the defendant, who was a corn dealer, was sent by him with a cart to the premises of Messrs. Rosling and Watson, also corn dealers, for twenty sacks of oats. The whole quantity was not delivered; and the plaintiff signed a receipt note for eighteen. On

his return to the defendant's it was found that only seventeen sacks were in the cart. Messrs. Rosling and Watson, on enquiry by the defendant, insisted that they had delivered eighteen sacks. The plaintiff, being further questioned, *made unsatisfactory answers: [*872] and the defendant then gave him into custody, and had him conveyed to a station house, and from thence to a police office. The magistrate, after hearing witnesses, remanded the plaintiff for further examination. He was again brought up for examination, and a second time remanded. Before the third hearing, Messrs. Rosling and Watson discovered that the missing sack had remained on their premises undelivered: they communicated this to the defendant; and he stated it to the magistrate on the third examination: and the plaintiff was thereupon discharged. There was no evidence to show that the defendant had induced the magistrate to remand the plaintiff on the first or second examination, or that he had unduly delayed making the statement on which the plaintiff was liberated. It was urged, on the defendant's behalf, that in this action he could be liable only for the first imprisonment and taking before the magistrate, not for the remand or any subsequent detention, these being the acts of the justice. Lord DENMAN, Ch. J. asked if there was any authority for this position; and, none being cited, he left the case to the jury on the whole matter of complaint: and they found for the plaintiff, damages 10*l.*

Whitehurst, in last Easter Term, moved for a new trial on the ground of misdirection, and cited *Holtum* v. *Lotun* (1).

Charnock now showed cause (2):

In *Holtum* v. *Lotun* (1) the plaintiff had given the defendant in *charge to a policeman for felony, and caused him to be taken before [*873] a magistrate, who remanded him: and PARKE, B. certainly expressed an opinion, that the defendant was not liable for the imprisonment subsequent to the remand, that being the act of the magistrate: but he ordered the damages before and after the remand to be found separately; the jury gave 20*l.* for the imprisonment before remand; and with this the plaintiff was satisfied. But the principle which should govern cases like the present is that laid down in the judgments of NARES, J. and the majority of the Court of Common Pleas in *Scott* v. *Shepherd* (3). The defendant is liable for the immediate

(1) 6 Car. & P. 726.
(2) Before Lord Denman, Ch. J., Coltman, Wightman and Erle, JJ.
(3) 3 Wils. 403; *S. C.* 2 W. Bl. 892.

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result of an act on his part which was clearly wrongful. He should have made proper enquiry at first; and the events shoewd that he had been guilty of rashness in setting the magistrate in motion. If he is not responsible for the ulterior proceedings, an injury is inflicted for which there is no remedy. The same argument which exempts him from liability as to the remand would exempt him as to all that happened after the plaintiff was delivered to a policeman; for it might be said that the confining him and carrying him before a magistrate were the acts of those who then had him in custody. Suppose an application were made to arrest under stat. 1 & 2 Vict. c. 110, s. 3 (1), and a Judge granted an order on affidavit, and the defendant were held to bail, but it afterwards proved that the arrest was in reality groundless, and the *capias* and bail bond were thereupon set aside and the party discharged: would the party procuring
[*874] the arrest be exempt from an action of trespass, *because the order was an act of the Judge?

(COLERIDGE, J.: Is there any authority for saying that the action would lie, if the affidavit was not falsely made?

LORD DENMAN, Ch. J.: The imprisonments under remand in this case are not laid as special damage, but as distinct acts of the defendant.

COLERIDGE, J.: You have to show that each remand and each imprisonment is the defendant's act.)

The subsequent acts may so bear upon the first that the Court will not think they ought to be divided: *Edgell* v. *Francis* (2).

Whitehurst, contrà:

It is true that the defendant may be liable for all that happened till the parties appeared before the magistrate. After that, the justice acted in the discharge of his official duty; and the acts done were his. He was bound to detain the plaintiff, even if the defendant had pressed for his release. A mistake was discovered; but before that time the case was out of the defendant's controul. The argument for the plaintiff would make a prosecutor in such a case answerable for the detention even to the time of trial. The remands, then, not being his acts, could not be the subject of an action of trespass: case might have lain; but then malice and want of

(1) Repealed by 32 & 33 Vict. c. 83, s. 20.—A. C.

(2) 1 Man. & G. 222.

probable cause must have been alleged and shown. This appears by the well known series of cases in which persons having wrongfully, as was alleged, put a Court in motion, have been sued in case or trespass, and trespass has been held not to lie. In *Waterer* v. *Freeman* (1) HOBART, Ch. J. says: "If a man bring an action upon a false surmise in a *proper Court, he cannot bring an action against him and charge him with it as a fault directly, and *ex diametro*, as if the suit itself were a wrongful act, for *executio juris non habet injuriam*:" but, "If a man sue me in a proper Court, yet if his suit be utterly without ground of truth, and that certainly known to himself, I may have an action of the case against him for the undue vexation and damage," "though the suit itself be legal, and I cannot complain of it, as it is a suit, as in the case before." The distinction is illustrated by *Rafael* v. *Verelst* (2), and is discussed by this Court in *Elsee* v. *Smith* (3).

[*875]

(COLERIDGE, J.: Suppose the defendant takes the plaintiff to a police office on a day when he knows that, as a matter of course, there will be a remand.)

That would be evidence of malice in an action for malicious prosecution.

(ERLE, J.: If the arresting were a trespass, and the remand were ground only for an action on the case, the same course of prosecution would be trespass on Saturday and case on Monday.)

It would.

(COLERIDGE, J.: Is not the remand a matter by which to measure the damages?)

It was so treated, but mistakenly (4). The defendant was not liable, as to the remand, in trespass, or in any form, if he arrested *bonâ fide* in the first instance.

(ERLE, J.: A turning point here may be, whether or not the remand was at defendant's instance.

(1) Hob. 205, 266 (5th ed.). See *De Medina* v. *Grove*, 74 R. R. 243 (10 Q. B. 172), in Ex. Ch., affirming the judgment of Q. B. in *De Medina* v. *Grove*, 74 R. R. 231 (10 Q. B. 152); *Moore* v. *Guardner*, 73 R. R. 648 (16 M. & W. 595.

(2) 2 W. Bl. 983, 1055.

(3) 24 R. R. 639 (2 Chit. Rep. 304; *S. C.* 1 Dowl. & Ry. 97).

(4) It was noticed in the argument that one remand was made when the defendant was not present; and *Whitehurst* contended that this alone would vitiate the verdict, damages having been given for every remand.

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LORD DENMAN, Ch. J.: Much may depend on that.)

In *Aitken* v. *Bedwell* (1), an action of trespass, where the captain
[*876] of an English ship *in a Russian port caused one of his crew to be imprisoned and flogged by Russian officers on shore, the question put to the jury by Lord TENTERDEN was: "Whether the punishment inflicted on shore was done by the constituted authorities, on the mere complaint of the defendant, or whether the defendant was the actor and immediate promoter of it?" If a man merely sues out a *ca. sa.* against another, on which an arrest is made, he is not liable in trespass, though he may be so liable if he takes a part in executing the writ, on the principle laid down by ASHHURST, J. in *Morgan* v. *Hughes* (2), that, "where the immediate act of imprisonment proceeds from the defendant, the action must be trespass, and trespass only; but where the act of imprisonment by one person is in consequence of information from another, there an action upon the case is the proper remedy." *Barber* v. *Rollinson* (3) and *Cooper* v. *Harding* (4) are to a like effect: and *Holtum* v. *Lotun* (5) closely resembles the present case.

(LORD DENMAN, Ch. J.: That case does not amount to a decision. But, if the remand here is considered as the independent judicial act of the magistrate, it will be difficult to say that the defendant is liable in this form of action. We will look at the declaration and the Judge's notes.)

Cur. adv. vult.

On the last day of Term (November 25th),

LORD DENMAN, Ch. J. said:

The verdict in this case cannot be sustained, the action being
[*877] trespass, and the *jury having given damages, not only for the trespass in arresting, but for the remand, which was the act of the magistrate.

Rule absolute.

(1 31 R. R. 712 (Moo. & Mal. 68).
(2) 2 T. R. 225, 231.
(3) 1 Cr. & M. 330; *S. C.* 3 Tyr. 266.
(4) 68 R. R. 599 (7 Q. B. 928).
(5) 6 Car. & P. 726.

BENYON *v.* CRESSWELL.

1848.
Nov. 17.

(12 Q. B. 899—904; S. C. 18 L. J. Q. B. 1; 12 Jur. 1086.)

[899]

If a vessel under fifteen tons' burden, navigating on the coasts of the United Kingdom, be registered by her owner, a British subject, he may transfer it to another British subject without any instrument in writing, or fresh registry; for sect. 34 of stat. 8 & 9 Vict. c. 89 (1) does not apply, inasmuch as, under stat. 8 & 9 Vict. c. 88, ss. 13, 14 (1), the original registration was unnecessary.

ASSUMPSIT for goods and chattels, and a boat or vessel, and an instrument in writing called a boat licence, sold, delivered and transferred by plaintiff to defendant at his request; and on an account stated.

Plea: *Non assumpsit.* Issue thereon.

On the trial, before Coleridge, J., at the Essex Spring Assizes, 1848, it appeared that the vessel in question was a pleasure boat of seven tons' burden. The vessel had been bought by the plaintiff from a former owner. That owner had, on 10th October, 1845, obtained a licence *under stat. 8 & 9 Vict. c. 87, s. 18 (2), wherein [*900] it was stated that the "yawl or vessel called the *Mingin*," "seven tons," was to be suffered "to be employed in fishing, attending fishing, and pleasure, between London and Newcastle, not exceeding twelve leagues from the coast," "to pass without any let" &c.: he had also entered into the usual bond against smuggling; and afterwards obtained a certificate of British registry, dated 14th October, 1845, wherein the vessel was described as a "ship or vessel" "of the burthen of seven tons." No subsequent registration was shown. The plaintiff's case was, that he had purchased the vessel since, and afterwards sold her to the defendant without any instrument in writing, delivering over to him the licence. It was not suggested that either plaintiff or defendant was not a British subject, or that the ship was not wholly navigated by British subjects. On the part of the defendant, the fact and circumstances of the sale were disputed: and it was further contended that the contract was void, there not being a transfer by instrument in writing. On this last point, the learned Judge reserved leave to move for a nonsuit: and he left the case, on the other facts, to the jury, who found a verdict for the plaintiff. In Easter Term, 1848, *Shee*, Serjt. obtained a rule *nisi* for a nonsuit, on the point reserved.

(1) Repealed by 17 & 18 Vict. c. 120, s. 4.

(2) "An Act for the prevention of smuggling."

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Petersdorff and *Needham* now showed cause:

[*901] Stat. 8 & 9 Vict. c. 89 (1), s. 34 (which corresponds to sect. 31 of stat. 3 & 4 Will. IV. c. 55 (2)) enacts: that, "when and *so often as the property in any ship or vessel, or any part thereof, belonging to any of her Majesty's subjects, shall, after registry thereof, be sold to any other or others of her Majesty's subjects, the same shall be transferred by bill of sale, or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever either in law or in equity"(3). Here it is true that the vessel has been sold, without any instrument in writing, after registry thereof: but the question is, whether the enactment applies when the vessel has been unnecessarily registered. Stat. 8 & 9 Vict. c. 88 (4), s. 13 (5), enacts that no ship shall be admitted to be a British ship unless registered: but sect. 14 (6) provides that British built boats or vessels under fifteen tons, wholly owned and navigated by British subjects, although not registered, shall be admitted to be British in all navigation in the rivers and upon the coasts of the United Kingdom. These sections correspond respectively to sects. 12 and 13 of stat. 3 & 4 Will. IV. c. 54 (7). The registry here is unmeaning on the face of it; for it shows the vessel to be within the exemption. The registry confers certain other benefits; but it is obvious that an owner, by registering an exempted vessel, could not obtain such benefits: the whole of the regulations as to registered vessels are inapplicable. If lands in Surrey were registered under the Middlesex Registration Act (8),

[*902] it *would be merely superfluous, and none of the consequences of registration would attach. * * *

Shee, Serjt. and *Lush*, *contrà*:

Stat. 8 & 9 Vict. c. 88, s. 13, does not compel registration, but only admits to certain benefits in case of registration: and sect. 14

(1) "An Act for the registering of British vessels," Royal assent, 4th August, 1845. [Repealed by 17 & 18 Vict. c. 120, s. 4.]

(2) "An Act for the registering of British vessels." [Repealed by 8 & 9 Vict. c. 84, s. 2.]

(3) See now Merchant Shipping Act, 1894 (57 & 58 Vict. c. 50), s. 24.

(4) "An Act for the encouragement of British shipping and navigation." Royal assent, 4th August, 1845. [Repealed by 12 & 13 Vict. c. 29, s. 1.]

(5) Merchant Shipping Act, 1894, s. 2 (2).

(6) Merchant Shipping Act, 1894, s. 3 (1).

(7) "An Act for the encouragement of British shipping and navigation." [Repealed by 8 & 9 Vict. c. 84, s. 2.]

(8) 7 Ann. c. 20.

merely gives those benefits in some cases without registration. It is therefore incorrect to speak of registration as being in any case necessary or not necessary: it is a matter of choice with the owner. Some benefits of registration might, no doubt, be obtained in the cases mentioned in sect. 14 without actual registration; but that does not prevent the operation of sect. 34 of stat. 8 & 9 Vict. c. 89, which uses perfectly general terms, and includes all cases of registration *de facto*. The contract of sale was therefore altogether inoperative: *Boyson* v. *Gibson* (1). Sect. 39 gives a priority to registered bills of sale: sect. 46 protects from the vendor's bankruptcy. The party seeking these benefits incurs the corresponding liability. No stress can be laid on the fact that the section last mentioned speaks of "ship:" it mentions "vessel" also: and, while sect. 13 of stat. 8 & 9 Vict. c. 88 speaks only of "ship," sect. 14 of the same Act speaks of "boats or vessels." The three *words are used indiscriminately. Indeed sect. 14 shows that, but for express provision, [*903] "boats" would be included in sect. 13, where the word is only "ship." And the same indiscriminate use of the words may be observed frequently in the series of Acts connected with shipping in 8 & 9 Vict. The analogy of an useless registration of land is inapplicable: in that case, the party registering obtains no advantage. * * *

LORD DENMAN, Ch. J.:

The arguments in support of the rule have not removed our doubt on the first point. I think it was not necessary that there should be any registration at all: and, that being so, the unnecessary registration did not make a written instrument a requisite for the transfer.

COLERIDGE, J.:

The foundation of the argument in support of the rule is, that this is "a ship or vessel" registered within the meaning of sect. 34 (2) of stat. 8 & 9 Vict. c. 89. If not, the enactment is inapplicable to the case. In support of this, it is said that in stat. 3 & 4 Will. IV. c. 54, s. 12 (3), and the corresponding section, the 13th (2), of stat. 8 & 9 Vict. c. 88, the only word used is "ship," while, in sect. 13 (4) of stat. 3 & 4 Will. IV. c. 54, and sect. 14 (4) of

(1) 4 C. B. 121.
(2) See now Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60), s. 24.
(3) Merchant Shipping Act, 1894, s. 2 (2).
(4) Merchant Shipping Act, 1894, s. 3 (1).

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stat. 8 & 9 Vict. c. 88, the proviso, by way of qualification of the preceding enactment, uses the words "boats or vessels," thus showing that the word "ship" is used as comprehending *boats or vessels under fifteen tons' burthen. But, supposing this argument correct, this, whether we call it ship, boat or vessel, is under fifteen tons' burthen, and so exempt from the necessity of registration.

WIGHTMAN, J.:

I am of the same opinion. I think this is not a "ship or vessel" registered within the meaning of the corresponding enactments, stat. 3 & 4 Will. IV. c. 55, s. 31, and stat. 8 & 9 Vict. c. 89, s. 34. In the respective statutes immediately preceding these two, the Legislature has drawn the line between the vessels which are required to be registered and those which are not: the dividing point is the fifteen tons' burthen. It is therefore clear that this, which is under fifteen tons, is not within the enactments which make a written instrument essential to a transfer.

ERLE, J.:

Before the defendant can apply these enactments to the present case, he must show that this boat is included under the denomination of "ship or vessel" of which the registry is contemplated by sect. 34 of stat. 8 & 9 Vict. c. 89. Now that some boats are not included I may assume, as for instance a boat on a river carrying only one man. There must therefore be some line: and that line the Legislature, I think, draws at fifteen tons' burthen.

Rule discharged.

1848.
Nov. 18.
Dec. 18.

REG. *v.* ARKWRIGHT (1).

(12 Q. B. 960—970; S. C. 18 L. J. Q. B. 26; 13 Jur. 300.)

[960]

By stat. 59 Geo. III. c. 134, s. 39, an order of the Church-building Commissioners (2) for stopping paths through a churchyard is to be made with consent of two justices, and on notice being given in the manner and form prescribed by the Highway Act, 55 Geo. III. c. 68 (3); and no appeal lies against the order. By stat. 55 Geo. III. c. 68, s. 2, the stopping up was to be by an order of two justices, provided that notice were given in the form annexed; which form stated that the order had been signed; but there was an appeal to the Sessions, s. 3; and, if no one appealed, or the order was

(1) Cited in *Colonial Bank of Australasia* v. *Willan* (1874) L. R. 5 P. C. 417, 444.

(2) Now the Ecclesiastical Commissioners (19 & 20 Vict. c. 55).

(3) Repealed by Highway Act, 1835 (5 & 6 Will. IV. c. 50), s. 1, but see *post*, p. 448.—A. C.

confirmed on appeal, s. 4, the way was to be stopped, and the proceedings conclusive.

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Held, that an order of the Commissioners, being final when made, must be preceded by notice; and that the words, "on notice being given," in stat. 59 Geo. III. c. 134, s. 39, must, with reference to such an order, be read "after notice given." And, where the order had been made first, and notice published afterwards, this Court, on *certiorari*, quashed the order for that reason.

In last Trinity vacation a *certiorari* was obtained, at the instance of Robert Arkwright, Esq., a party aggrieved, to remove into this Court an order of the Derbyshire Quarter Sessions (June, 1847), confirming and directing to be enrolled an order of her Majesty's Commissioners for building new Churches. And, in the present Term, a rule *nisi* was obtained for quashing both orders. The material facts were as follows.

On March 10th, 1847, the Commissioners, acting under stat. 59 Geo. III. c. 134, s. 39 (1), made the following order.

"Whereas the churchyard of the parish church of Bakewell in [961] the county of Derby is intersected by various foot roads and foot paths, which, at a meeting of the inhabitants of the said parish in vestry assembled, have been deemed and considered to be useless and unnecessary: Now therefore her Majesty's Commissioners for building new Churches, in exercise of the power in this behalf given to them by the 39th section of an Act" &c. (59 Geo. III. c. 134), "and of every other power or authority enabling them in this behalf, and in conformity with certain resolutions made and passed at a vestry meeting of the parishioners of the said parish of Bakewell in the county of Derby, and with the consent of William Pole

(1) Stat. 59 Geo. III. c. 134, "To amend and render more effectual an Act passed in the last Session of Parliament" (58 Geo. III. c. 45), "for building and promoting the building of additional churches in populous parishes," enacts,

Sect. 39. "That it shall be lawful for the said Commissioners, if they should think fit, to alter, repair, pull down and rebuild, or order or direct to be altered," &c. "and rebuilt, the walls or fences of any existing churchyard or burial ground of any parish or chapelry, and to fence off with walls or otherwise, any additional or new burial ground, to be set out or provided by virtue of this Act; and also to stop up and discontinue, or alter or vary, or order to be stopped up" &c., "or altered" &c., "any entrance or gate leading into any churchyard or burial ground, and the paths, footways and passages into, through or over the same, as to them may appear useless and unnecessary, or as they shall think fit to alter or vary; provided that the same be done with the consent of any two justices of the peace of the county, city, town or place, where any such entrance, gate, path or passage shall be stopped up or altered; and on notice being given in the manner and form prescribed by an Act passed" &c., "intituled" &c. (55 Geo. III. c. 68, Highway Act, amending stat. 13 Geo. III. c. 78).

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Thornhill and William Underwood, Esquires, two of her Majesty's justices of the peace acting in and for the said county of Derby, as testified by an instrument under the hands of the said two justices and hereunto annexed, do, by this instrument under the common seal of the said Commissioners, order and direct as follows, that is to say: That a certain entrance marked 11 on the plan hereunto annexed, and a certain foot path or foot road leading therefrom and
[*962] through the churchyard of the said parish church *of Bakewell," &c., "and also" &c. (describing certain other entrances and footpaths), "shall henceforth for ever hereafter be stopped up and discontinued, the same several footpaths" &c. "appearing to the said Commissioners to be useless and unnecessary. And the said Commissioners do hereby further order" &c.: The order then, in like manner, directed the stopping of other entrances and paths, referring to the before mentioned plan. "And the said Commissioners do hereby further order and direct: That the only foot paths or foot roads which in future shall exist in, through or over the said churchyard shall be those which do or shall lead from the present entrance, near" &c., "marked 7 on the said plan hereto annexed, and from the entrance at the south side, which entrance is marked 9 on the said plan, the gates of which entrance are to remain open during the day and to be closed during the night; and from the entrance at the north side of the churchyard at the entrance marked 8 before mentioned on the said plan; each and all of which said foot paths or foot roads respectively are coloured blue on the said plan hereunto annexed. And the said Commissioners do hereby, so far as they lawfully can or may, order and direct that the gates at the said several entrances marked respectively 3 and 7 on the said plan shall be kept closed except on Sundays and other days on which Divine services are solemnized. In witness whereof" &c. (Seal of the Commissioners.)

The consent referred to in the last mentioned order was dated on July 21st, 1846. The two justices thereby gave their consent "to an order of the Commissioners made or hereafter to be made" under stat. 59 Geo. III. c. 134, for stopping up the gates and
[*963] entrances *&c., and stopping up, discontinuing and altering &c. the footpaths, subsequently mentioned in the order, and which were, by the two justices, in their written consent, declared to be respectively unnecessary and to require alteration.

Notices were affixed in several public places, according to the direction of stat. 55 Geo. III. c. 68 (adopted in stat. 59 Geo. III.

c. 134, s. 39), on three successive Sundays, but after the Commissioners had made their order; the earliest being on March 14th, 1847. The notices were as follows:

"Notice is hereby given: That, on the 21st day of July in the year of our Lord, 1846, a consent in writing was signed by William Pole Thornhill and William Underwood, Esquires, two of her Majesty's justices of the peace in and for the county of Derby, to an order of her Majesty's Commissioners for building new Churches (authorised in that behalf by an Act of Parliament passed in the 59th year of King George III. c. 134), made or to be made, for stopping up and discontinuing certain foot paths or foot roads, gateways, stiles, and entrances, thereinafter mentioned, in and to the parish churchyard of Bakewell, in the said county, in the terms and as is hereinafter set forth in the order of the said Commissioners. And that the said Commissioners, by a certain order under their common seal, dated the 10th day of March, 1847, in exercise of the powers in that behalf given to them by the 39th section of the said Act, and of every other power enabling us in this behalf, did order and direct as follows, that is to say:" (The substance of the order was then set out.) "And that the said order was duly made by the said Commissioners on the 10th day of March, A.D. 1847. And that the said *order and consent will be [*964] lodged with the clerk of the peace in and for the said county, at the General Quarter Sessions of the peace to be holden at Derby, in and for the said county, on the 30th day of June next. And also that the said order will, at the said Quarter Sessions, be confirmed and enrolled, unless upon an appeal against the same to be then made it be otherwise determined. Dated at Bakewell the 11th day of March, A.D. 1847.

"GEORGE HOLMES, } Churchwardens
"THOMAS MASTERS, } of Bakewell."

No plans were annexed to the notices, although, in these, the references to plans were retained in setting out the order.

The order of Sessions recited the order of the Commissioners, and the consent of justices, as produced at the Sessions on motion to confirm and enrol.

Several objections were relied upon as grounds for the *certiorari* and for quashing the order of Sessions: among others, that there ought to have been separate consents and orders for stopping the respective ways (*Rex* v. *Milverton* (1)); that plans should have been

(1) 44 R. R. 606 (5 Ad. & El. 841).

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published with the notices; and that the order of the Commissioners, being made before publication of notices, was illegal. The report is confined to the last point, on which alone the COURT gave judgment.

In the last Term (1),

Sir J. Jervis, Attorney-General, and *Welsby* showed cause:

[*965] The objection that the notices were published *after the making of the order is immaterial; for no appeal lies from an order under sect. 39 of stat. 59 Geo. III. c. 134, though by stat. 55 Geo. III. c. 68, there referred to, an appeal was given: sect. 3. This is expressly decided as to the former statute by *Reg.* v. *Stock* (2). The notice here is meant to apprise parties, not of what is intended, but of what has been done. The material steps have been taken; the justices have consented, and the Commissioners have made their order; then the notice enables those who are interested to ascertain that no more has been done than the consent authorises.

Whitehurst, contrà:

The fact that the notices were subsequent to the order is a fatal objection on the merits. The opposite argument would authorise the Commissioners to stop public footpaths without notice, only publishing notices afterwards which, even if untrue, could not be called in question. The power to stop is given by sect. 39 of stat. 59 Geo. III. c. 134, "provided that the same be done with the consent of any two justices of the peace of the county," &c., "and on notice being given in the manner and form prescribed by" stat. 55 Geo. III. c. 68. By that Act, sect. 2, authority was given to justices to stop up unnecessary ways, "provided, that" "a notice, in the form or to the effect of Schedule (A.) to this Act annexed, shall be affixed in legible characters at the place" from whence the way is directed to be turned, diverted or stopped up. Sect. 3 gave an appeal to the Sessions; and, by sect. 4, if there was no appeal, the order and proceedings were to be confirmed by that Court, the ways stopped, and the proceedings to be conclusive.

[*966] And the form of *notice in Schedule (A.) was, that, on &c., "an order was signed by" two justices, for turning &c., "and that the said order will be lodged with the clerk of the peace," "at the General Quarter Sessions" &c., "and also that the said order will

(1) November 18th. Before Lord Denman, Ch. J., Coleridge, Wightman and Erle, JJ.

(2) 8 Ad. & El. 405.

at the said Quarter Sessions be confirmed and inrolled, unless upon an appeal against the same to be then made, it be otherwise determined." The notice, there, was certainly subsequent to the order; but, under that statute, there was no previous consent of justices: the consent, under stat. 59 Geo. III. c. 134, is equivalent to the order of justices under stat. 55 Geo. III. c. 68, while yet subject to appeal: the notice ought to follow: then the Commissioners are substituted for the Sessions, to decide upon any objection which parties, having notice, may raise; and, if such objection be not made or be over-ruled, the order is final. This construction makes all the proceedings equitable and sensible.

(COLERIDGE, J.: The magistrates' order under stat. 55 Geo. III. c. 68, was only inchoate till the Sessions. The notice was, in effect, antecedent to the order.)

The words "on notice being given," in stat. 59 Geo. III. c. 134, s. 39, must be read "after notice given." If the order might be conclusively made first, the Commissioners might often act in ignorance of material facts, and the most important rights be compromised without remedy.

Cur. adv. vult.

LORD DENMAN, Ch. J., in this vacation (December 18th), delivered the judgment of the COURT:

The question in this case arises upon an order under the common seal of the Church Commissioners for stopping up certain entrances to, and certain footpaths *in and through, the churchyard of the [*967] parish church of Bakewell. This order has been made under the powers conferred by the 39th section of stat. 59 Geo. III. c. 134, and with the consent of two justices. Notices also have been given, which for the present purpose may be assumed to be correct in form, subject to our future remarks: but they were affixed and published respectively after the making and execution of the order. This order has been confirmed in fact at the Quarter Sessions: but it is admitted that the justices at Sessions had no jurisdiction in the matter, and that their order of confirmation is merely null and void. With regard to the order of the Commissioners, it is objected among other things) that it is bad because made by them, and consented to by the two justices, before the affixing and publication of the notices; and we are of that opinion.

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The section in question gives the Commissioners the power to stop up, provided that the same be done with the consent of any two justices of the county, city, town or place where any such entrance or path shall be stopped up, and on this notice being given in the manner and form prescribed by stat. 55 Geo. III. c. 68. In *Reg.* v. *Stock* (1) it was decided that, although this statute was repealed by stat. 5 & 6 Will. IV. c. 50, yet so much of it as was incorporated into stat. 59 Geo. III. c. 134, remained of force for the purposes of that statute; and it was also then determined that it did not by any implication from the language of the incorporated notice give an appeal to the Sessions against the order of the Com-

[*968] missioners. Upon reference to the form of the notice in *question, it runs thus: "Notice is hereby given, that on the day of last, an order was signed by" ; "and that the said order will be lodged with the clerk of the peace for the said county, at the General Quarter Sessions of the peace to be holden at " "on the day of next," and "will at the said Quarter Sessions be confirmed and inrolled, unless upon an appeal against the same to be then made, it be otherwise determined." As the notice is to be given in the manner and form prescribed by this statute, it is argued that it must be given after the order made: and, if this be so, it cannot be denied that these grave consequences will follow; that a power subject to no revision on appeal is vested in the Commissioners of making an order which may very materially affect the rights and conveniences of the public and the parishioners, moved thereto by the application of any one or more individuals behind the backs of all others, and fortified only by the consent of any two magistrates, selected it may be from interested motives, and from any part of the county. That a case so extreme as this is not likely to happen in fact, is no answer to the argument against the construction which makes it possible: without supposing any ill intention in the Commissioners, and scarcely any negligence, they may be deceived; and at all events the rights of others ought not to be left so unprotected.

But in truth the whole argument in support of the notice is founded on a strictly literal construction of the statute, in regard to the notice, which cannot be consistently maintained throughout as to the whole of the notice. All the latter part of it, which states the lodging of the order with the clerk of the peace, its inrolment

[*969] *and confirmation by the Sessions, and its liability to appeal, have

(1) 8 Ad. & El. 405.

no application whatever to the order now under consideration. If, then, all this, which in truth is the most important part of the notice as we find it in stat. 55 Geo. III. c. 68, must be rejected, why are we bound to the past tense in the commencement? It seems to us that we give full effect to the words in the 39th section of stat. 59 Geo. III. c. 134, which direct the notice to be given in the manner and form prescribed by stat. 55 Geo. III. c. 68, when we say that it must be affixed at the same places, published in the same way in the newspapers, and for the same number of times and during the same periods, and with the same particulars as to the ways and entrances to be stopped, which would be required under stat. 55 Geo. III. c. 68; but that, in order to make such notice answer the purpose intended, it must be given before the order is made: and there is no difficulty in fixing how long before, as it cannot comply with the requisitions of the statute unless it be given at least three weeks before the order made; and there is no reason for more.

When, indeed, it is recollected that, under stat. 55 Geo. III. c. 68, the order of the justices, though signed before, was not complete or effective until after, the notices had been given and the Sessions had confirmed it, whereas here the order takes effect from the time of its being made, the difference in fact as to the order of time in which the notice must be given is more nominal than real: we do more substantially follow the statute of 55 Geo. III., by saying that the notice must be given before the order is made, than if we followed literally the form given.

The statute of 59 Geo. III. requires that the order should *be made on notice being given. The words "on" or "upon" (it has been decided) may "either mean before the act done to which it relates, or simultaneously with the act done, or after the act done, according as reason and good sense require," "with reference to the context, and the subject-matter of the enactment:" *Reg.* v. *Humphery* (1). It cannot here mean simultaneously with, for the notice is manifold, and continued for many days; if it mean before, all the inconvenient consequences will follow which we have already pointed out. We must, therefore, construe it as synonymous with "after"; that is, the order must be made after notice given. So understood, the section is reasonable throughout; and sufficient security is given that the Commissioners shall be informed of all conflicting interests and desires before they proceed to the

[*970]

(1) 50 R. R. 418 (10 Ad. & El. 335, 370).

REG. v. ARKWRIGHT. exercise of their large and final jurisdiction over the subject-matter.

On this ground we think the rule must be made absolute for quashing the orders.

Rule absolute.

1848.
Nov. 27.
Dec. 18.

DOE D. WILLIAM PENNINGTON AND OTHERS v. TANIERE.

(12 Q. B. 998—1014; S. C. 18 L. J. Q. B. 49; 13 Jur. 119.)

[998]

A Dean and Chapter were empowered by a local Act to grant building leases of certain lands for ninety-nine years, provided that in every such lease there was a covenant by the lessee to build. They granted a lease for ninety-nine years, omitting the covenant.

During the supposed term, after the death of the Dean under whom the lease had been granted, the lessee remained in possession, and continued to pay the reserved rent to the succeeding Deans and Chapter, who distributed it among themselves. Held that, if the lease was voidable only, it was made good, as against each successive Dean and Chapter, for their own times respectively, by such their receipt and distribution of the rent.

And that, if the lease was absolutely void, such receipt and distribution were evidence from which, without proof of any instrument under seal, a demise from year to year might be presumed against them; the presumption in such a case being the same against a corporation aggregate as against an ordinary person (1).

ON the trial of this ejectment, at the Guildford Summer Assizes, 1846, a verdict was taken for the plaintiff, with 1*s.* damages, subject to a reference of the cause and all matters in difference to a barrister, who was to determine what should be done by either party respecting the matters in dispute, and was empowered to order a verdict to be entered for plaintiff or defendant, as he should think proper; with liberty also to state facts for the opinion of this Court.

The arbitrator made his award, directing a verdict to be entered for the defendant; and he stated facts, which, so far as they are material to this report, were as follows.

The Dean and Chapter of Canterbury, being seised in fee of the manor of Walworth, by indenture, dated 29th June, 1771, between them and one Henry Penton, duly executed, demised the said manor, which included, with other property, the property in question in this cause, to the said H. Penton, for twenty-one years from the Nativity of Saint John the Baptist then last past.

[*999] In 1774 an Act of Parliament was passed (2); whereby, *after

(1) *Lawford* v. *Billericay R. D. Council* [1903] 1 K. B. 772, 72 L. J. K. B. 554, C. A.

(2) 14 Geo. III. c. 43, private: "for enabling the Dean and Chapter of Canterbury, Henry Penton, Esquire, and Thomas Brandon, to grant building leases, pursuant to two several agreements entered into for that purpose."

reciting the lease of 29th June, 1771, it was enacted, that it should and might be lawful to and for the said Dean and Chapter and their successors, and the said Henry Penton, his executors, administrators and assigns, jointly, and they severally and respectively were thereby fully empowered and authorised, notwithstanding any statute &c., from time to time, by indenture duly executed under the seal of the said Dean and Chapter, and also under the hand and seal and hands and seals of the said H. Penton, his executors, &c., to make any demise or lease, demises or leases, of all or any part or parts of the several tenements, lands and premises to the said H. Penton demised, and described in the recited indenture of lease, also of all ways, waters, &c., easements, &c., and appurtenances whatsoever thereto belonging &c., for any term or number of years not exceeding ninety-nine years, to take effect in possession and not in reversion or remainder or by way of future interest, for the purpose of making any new buildings, erections or improvements on the same or any part thereof respectively, at the best and most improved yearly rent, &c., without taking any fine, premium, &c., and so as the rents or rent were reserved and made payable quarterly &c., and that one moiety of the rent or rents to be reserved in respect of the premises so demised to the said H. Penton &c., were made payable to the said Dean and Chapter and their successors, and the other moiety to the said H. Penton, his executors, administrators *and assigns [*1000] (except that a peppercorn only was to be reserved for the first two years of the term to be granted): and so as that every such lease were under the following restrictions: viz., that no such demise or lease should be valid in the law, unless there should be therein contained a condition of re-entry on non-payment of rent, and unless the lessee or lessees executed a counterpart or counterparts of his, her or their respective lease or leases, and thereby covenanted for the payment of the rent or rents to be thereby respectively reserved, and to build and keep in repair the messuages and buildings intended and agreed to be built by such leases respectively: and so as there were contained in such leases respectively all such conditions, covenants, &c., on the part of the lessee or lessees, and their respective executors, &c., as were or should be proper in such cases.

By indenture of 27th June, 1778, the premises demised to H. Penton by the lease of 29th June, 1771, were, on his surrender, redemised by the Dean and Chapter to him for twenty-one years from the 24th June, 1778.

By indenture dated 8th June, 1779, H. Penton demised to Thomas

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Clutton certain parts of the manor of Walworth, which the said H. Penton held as aforesaid by the last mentioned lease from the Dean and Chapter, including the property in question in this cause, for twenty-one years from Michaelmas, 1778, with covenant to renew such lease from time to time as and when his, Penton's, lease from the Dean and Chapter was renewed, for a term of sixty-one years from Michaelmas, 1778.

[*1001] By indenture dated 25th June, 1785, the premises *demised to H. Penton by the said indentures of 29th June, 1771, and 27th June, 1778, were, on his surrender, redemised by the Dean and Chapter to him for twenty-one years from Midsummer, 1785.

In supposed pursuance of the powers conferred by the said Act of Parliament passed in 1774, and with intent to exercise the same, by an indenture dated 26th June, 1786, duly executed under the seal of the Dean and Chapter, and also under the hand and seal of H. Penton, and made between the Dean and Chapter and H. Penton of the one part and Thomas Clutton of the other part, the said T. Clutton having prior thereto surrendered his interest in the premises by the indenture of 8th June, 1779, demised, as to such part thereof as was intended to be demised by the now stating indenture; after reciting the said Act of Parliament; It was witnessed, that, by virtue and in pursuance of the powers and authorities given to and vested in the said Dean and Chapter in and by the recited Act, and for and in consideration of the rents and covenants thereinafter reserved and contained on the part of T. Clutton, &c., and of the costs &c. that he had been at, laid out and expended, and would be at, lay out and expend, in the erecting and building of several brick messuages or tenements on the land thereinafter mentioned, they the said Dean and Chapter and H. Penton, and each of them, demised, granted, and to farm let unto the said T. Clutton all the piece or parcel of land therein particularly mentioned, parcel as aforesaid of the said manor of Walworth, together with all such messuages or tenements as were then erecting and building, or should at any time during the now stating demise be erected and built, on the

[*1002] said piece or parcel *of land or any part thereof: *habendum* to the said T. Clutton, his executors, administrators and assigns, from the feast of St. Michael then next ensuing, for and during and unto the full end and term of ninety-nine years: yielding and paying &c., yearly, during the first two years, to the Dean and Chapter and H. Penton one pepper corn, and also yielding and paying yearly, during the remaining ninety-seven years, to the Dean and Chapter

and their successors the yearly rent of 12*l.* 10*s.*, and to H. Penton, his executors, &c., the like yearly rent of 12*l.* 10*s.*: both rents to be paid quarterly as therein mentioned. The last mentioned lease contains a condition of re-entry on non-payment of the rents thereby reserved: and the lessee duly executed two counterparts thereof, and thereby covenanted with the Dean and Chapter and H. Penton severally, and to and with their several and respective successors, executors, administrators and assigns, for payment of the rents thereby reserved, and to keep in repair the said messuages or tenements, and the buildings then erecting and building, or to be erected and built, upon the said piece or parcel of ground. He further covenanted to pay all taxes &c., and to deliver up the premises, so kept in repair as aforesaid, to the Dean and Chapter and H. Penton and their successors, &c., at the end &c. of the term, with all fixtures &c. He also covenanted that it should be lawful &c. (for the landlords from time to time to enter to view the state of repairs, &c.); that he, his executors, &c., would repair on notice; and that he would not carry on certain trades &c. And the lessors covenanted for quiet enjoyment, by the lessee, &c., on payment of the rents and performance of the covenants.

In this last mentioned lease there was not, nor was *there in the [*1003]
counterpart thereof, any covenant on the part of the lessee to build on the premises thereby intended to be demised.

The premises so demised by the last mentioned indenture were part of the said manor of Walworth, and comprehend the premises sought to be recovered by this ejectment. By virtue of this last demise, T. Clutton entered and built upon the premises so demised to him: and he and his assigns and undertenants have from the time of the making of the last mentioned indenture hitherto constantly been in possession and occupation of the premises in question in this cause; and he and his assigns have constantly paid the rent or sum of 12*l.* 10*s.*, thereby reserved, to the said Dean and Chapter, which has been from time to time divided amongst the said Dean and Chapter in the proportions in which they were respectively entitled to the same: and T. Clutton and his assigns in like manner constantly paid to the said H. Penton the rent or sum of 12*l.* 10*s.* reserved to him by the last mentioned lease, until 1801, when H. Penton assigned all his interest in the said annual sum of 12*l.* 10*s.*, to one George Hart, to whom or to whose representatives the same has hitherto, since 1801, been paid by T. Clutton or his assigns.

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Gurney, for the plaintiff:

First, the lease of 26th June, 1786, was void, as contravening stat. 13 Eliz. c. 10, concerning ecclesiastical leases, and not conforming to the power contained in the local Act, which required a covenant to build. Or, if not absolutely void, it was good only during the life of the Dean under whom it was granted. That it would enure even for
[*1007] that time might be questioned, according to *Morrice* *v. *Antrobus* (1) and some other early authorities, but seems established by Co. Litt. 45 a, *Roe* d. *Earl of Berkeley* v. *Archbishop of York* (2), *Lincoln College's* case (3), and *The Bishop of Salisbury's* case (4). Clearly, however, it could not continue longer than the life of the Dean under whom it was first made: nor, after that time, could receipts of rent by the Chapter under a succeeding Dean give such lease a new validity: *Rickman* v. *Garth* (5), Com. Dig. Estates (G 5) (6). The law, in this respect, is the same as in the case of leases by tenant for life: *Roe* d. *Jordan* v. *Ward* (7), *Doe*, lessee of Simpson, v. *Butcher* (8), *Goodright*, lessee of Wynne, v. *Humphrys* (9), *Doe* d. *Potter* v. *Archer* (10), *Bowes* v. *East London Waterworks Company* (11).

Gurney otherwise argued that, as the lease of 1786 was clearly intended to take effect under the power, it could not be made, by construction, to pass an interest not according to the power; citing *Roe* d. *Earl of Berkeley* v. *Archbishop of York* (12) and *Colt* and *Glover* v. *Bishop of Coventry and Lichfield* (13).

(*Peacock, contrà*, referred to 1 Sugd. Powers, 423, 7th ed. c. 6, s. 8, § 19; and COLERIDGE, J. mentioned *Doe* d. *Daniel* v. *Keir* (14).)

Gurney also contended that, if any of the payments of rent after the death of the first Dean could be supposed to establish a new
[*1008] demise, it must be *a lease in reversion, inasmuch as there were valid leases of the manor subsisting at the time of those payments; but the Dean and Chapter could not, under their power, lease in reversion. (These points are not further noticed, the judgment not having turned upon them.)

But, assuming these arguments to be correct, it will be contended

(1) Hardr. 325.
(2) 8 R. R. 413 (6 East, 86, 103).
(3) 3 Co. Rep. 58 b, 60 a.
(4) 10 Co. Rep. 58 b, 60 b.
(5) Cro. Jac. 173.
(6) Last *placitum* but one.
(7) 2 R. R. 728 (1 H. Bl. 97).
(8) 1 Doug. 50.
(9) 1 Doug. 52, note (14).
(10) 1 Bos. & P. 531.
(11) 23 R. R. 84 (Jac. 324).
(12) 8 R. R. 413 (6 East, 103—106).
(13) Hob. 140, 159, 160, 5th ed.
(14) 33 R. R. 378 (4 Man. & Ry 101).

that, at all events, the defendant's payment of rent, and the acceptance of such rent by the Dean and Chapter, created a good tenancy from year to year, which could be determined only by notice to quit; and no notice has been given. In an ordinary case, perhaps, a tenancy from year to year might be presumed under such circumstances; but it cannot where a corporation is the landlord. The general rule is that aggregate corporations can regularly do no act without writing under seal: 2 Bac. Abr. 265. (7th ed.) tit. Corporation (E) 3, Com. Dig. Franchises (F 13). Exceptions have been allowed in cases of trading corporations, and for the transacting of small matters; but the principle is adhered to: and in *Cary* v. *Matthews* (1), where it is said that "a corporation aggregate may appoint a bailiff to distrain without deed or warrant, as well as a cook or butler," the reason given is, that "it neither vests nor divests any sort of interest in or out of the corporation." In *Mayor of Ludlow* v. *Charlton* (2), ROLFE, B. delivering the judgment of the Court of Exchequer, pointed out that the rule requiring the contracts of corporations aggregate to be under seal was not merely technical, but founded on reasons which could not be generally set aside without great inconvenience. In the judgment of this Court in *Church* v. *The Imperial Gas Light and Coke Company* (3), the principle of [*1009] exception is said to be "convenience amounting almost to necessity." As to interests in land, almost all the authorities agree that an aggregate corporation cannot receive or grant them without seal: to this effect are Co. Litt. 94 b, *Bellamy's* case (4), and Com. Dig. Franchises (F 13) (where it is said that, without deed, such corporation "cannot make a feoffment, or demise, or give a license"). It has been held that a corporation aggregate might recover in assumpsit for use and occupation: *Dean and Chapter of Rochester* v. *Pierce* (5), *Southwark Bridge Company* v. *Sills* (6); but the reason expressly given in each case was that the action was not grounded upon a demise; and it was observed in both instances that, if a demise were relied upon, a deed would have been necessary.

(WIGHTMAN, J. mentioned *The Mayor of Stafford* v. *Till* (7).)

The only case in which a supposition appears that there might be

(1) 1 Salk. 191.
(2) 55 R. R. 794 (6 M. & W. 815, 823).
(3) 43 R. R. 638 (6 Ad. & El. 846, 861).
(4) 6 Co. Rep. 38 a, 38 b.
(5) 11 R. R. 673 (1 Camp. 466).
(6) 2 Car. & P. 371.
(7) 29 R. R. 511 (4 Bing. 75).

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a corporation lease not under the common seal is *Wood* v. *Tate* (1): but there the general question was not argued; nor were the old authorities referred to. The doctrine of the earlier cases is supported by modern ones (with the exception of some relating to corporations for trading purposes) in which corporations aggregate have been defendants: *Gibson* v. *East India Company* (2), *Arnold* v. *The Mayor of Poole* (3), *Paine* v. *Strand Union* (4). The authorities on the subject are very fully discussed in *The Fishmongers' Company* v. *Robertson* (5). The tenancy in question, therefore, at the time [*1010] *when this action was brought, was only a tenancy at will, according to the doctrine stated in Woodf. Land. and Ten. 170, 171 (ed. 6), book 1, c. 5, s. 3: "If a man enter under a void lease, and pay rent, he is not a disseisor, but a tenant at will:" and that tenancy has been determined by demand of possession.

Peacock, contrà:

Although the lease of 1786 to Clutton was not strictly in accordance with the power or with the statute as to ecclesiastical leases, it was not void, but voidable only. On this point he cited 4 Bac. Abr. 674 *et seq.* (7th ed.), tit. Leases and Terms for Years (E); and he observed that ecclesiastical leases are void or voidable after the death of the grantor, according to the subject-matter; void, if the thing leased lies merely in grant or prender, but, if it lie in livery, voidable only, and confirmable by acceptance of rent: 4 Bac. Abr. 761 *et seq.*, tit. Leases and Terms for Years (H), 1, 2, 1 Shepp. Touchst. 283, 284, c. 14. And he urged that, in the present case, the lease was good against the Dean and Chapter who made it, and good also against their successors, in whose times it had been confirmed by receipt, and distribution among them, of the rents, and by the acts of successive Deans (including the party who was Dean when this action was brought), in granting leases of the Walworth manor estate, expressly subject to building leases, of which that in question was one; and that this last was a confirmation by deed.

But, further, the Dean and Chapter, by allowing the occupiers to build upon the land in the character of lessees, and by acceptance of rent from them in the same character also, had estopped them- [*1011] selves from saying *that there was no demise, according to the principle of *Pickard* v. *Sears* (6), *Gregg* v. *Wells* (7), and *Coles* v. *The*

(1) 2 Scott's N. R. 247.
(2) 50 R. R. 688 (5 Bing. N. C. 262).
(3) 61 R. R. 664 (4 Man. & G. 860).
(4) 70 R. R. 503 (8 Q. B. 326).
(5) 63 R. R. 242 (5 Man. & G. 131).
(6) 45 R. R. 538 (6 Ad. & El. 469).
(7) 50 R. R. 347 (10 Ad. & El. 90).

Bank of England (1). The award states that the Dean and Chapter have received rent, and does not treat the payments as mere compensation for a permissive occupation. Rent implies a demise; and it must be presumed therefore that every thing essential to the validity of the demise had been done. In *Beverley* v. *Lincoln Gas Light and Coke Company* (2), PATTESON, J., delivering the judgment of the COURT, said: "Call it by whatever name we please, permission or demise, it clearly binds the corporation; the party occupying and paying rent under it acquires rights from the corporation, becomes their tenant from year to year, and can be ejected only by the same means as would be available for an individual landlord;" and a distinction is there recognized between executed and executory contracts for the occupation of land (3).

Gurney replied.

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered judgment: [1012]

A great many points were made upon the argument in this case: but, in the result, the question upon which the entry of the verdict

(1) 10 Ad. & El. 437.

(2) 45 R. R. 626 (6 Ad. & El. 829, 840).

(3) *Peacock* contended that, unless the payments to the Dean and Chapter had been accepted as rent due upon a demise, the Statute of Limitations was a bar to the action, as there had been no possession in the Dean and Chapter within twenty years unless by the receipt of rent. On this point the Court gave no opinion. *Peacock* referred to an unreported case of *Doe* d. *Pennington* v. *Barrell* and another, where the same lease came in question which was under dispute in the case above reported. The cause was tried before Tindal, Ch. J. at the Guildford Summer Assizes, 1845. There had been no demand of possession. The defendants had a verdict; and a rule nisi was obtained, to enter the verdict for the plaintiff. Cause was shown, December 17th, 1846, before Lord Denman, Ch. J., Coleridge, Wightman and Erle, JJ., and the rule was discharged in Michaelmas vacation (December 17th), 1846. Lord DENMAN, Ch. J., who delivered the judgment of the COURT, said that it was unnecessary to pronounce any opinion upon the validity of the lease or the creation of a tenancy from year to year, because, according to the evidence before the Court, the action was barred by the Statute of Limitations. He observed: "This ejectment is brought without notice to quit or a demand of possession, upon the ground that the present possession of the defendants is wrongful; and, if it is wrongful now, it was the same more than twenty years before the action was commenced; and such a continuance of a wrongful possession is a bar to this action. This difficulty cannot be removed by the annual payments unless the plaintiff admits them to be payments of rent due under a term, which he refuses to do, because the existence of the term in the defendants, which has not been determined, would defeat the action. On the second point he claims to treat the payments as acknowledgments of the landlord's title, without admitting them to show a correlative right in the tenant; but this he cannot do."

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depends was, whether the Dean and Chapter of Canterbury had by receipt of rent adopted and confirmed, as against themselves, the lease of 1786, or created a tenancy from year to year which was not determined when the ejectment was brought. The facts which raise the only question necessary for us to determine are very short.

In 1786, the Dean and Chapter of Canterbury (acting, as they supposed, under the authority of a private Act of Parliament), together with Henry Penton, granted a lease of premises, including those in question, for ninety-nine years, reserving a rent to the Dean and Chapter, and another rent to Henry Penton.

These rents have been regularly paid down to the time of the proceedings in question, and have been received by the lessors and their successors, including the present Dean and Chapter. It was agreed upon the argument that the power to grant leases had not [*1013] been pursued, *and that the lease of 1786 was certainly voidable, if not void. The lessors of the plaintiff contended that it was absolutely void; and the defendants that it was voidable only by each successive Dean and Chapter, but that it was capable of confirmation by them in succession by payment and acceptance of rent under it; and that, at all events, if actually void, the acceptance of rent created a tenancy from year to year determinable only by notice to quit. With respect to the tenancy from year to year, the lessors of the plaintiff contended that, in order to establish such a tenancy, a demise by the Dean and Chapter by deed must be shown.

It is unnecessary for us to give any positive opinion as to the lease of 1786 being voidable only or absolutely void; because, even if absolutely void, as contended for by the lessors of the plaintiff, the payment and receipt of rent is evidence, we think, against the Dean and Chapter, of a demise by them from year to year; and that the presumption arising from such payment and acceptance is the same in the case of a corporation as of other persons.

To enforce an executory contract against a corporation it might be necessary to show that it was by deed; but, where the corporation have acted as upon an executed contract, it is to be presumed against them that every thing has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. This is by no means inconsistent with the rule that, in general, a corporation can only contract by deed: it is merely raising a presumption against them, from their acts, that [*1014] they have *contracted in such a manner as to be binding upon

them, whether by deed or otherwise; and we are not aware of any decision or authority against this view of the case.

If the lease of 1786 was voidable only, it is clear from the authorities cited on the argument that it was set up by each successive Dean and Chapter by acceptance of the rent. If we understand right, there is no demise by the Dean and Chapter in the declaration in this case (1); but the lessors of the plaintiff contend that the place in question was demised to them by leases first in 1789, then in 1805, and so on; the Dean and Chapter not being at those times bound by any lease to those under whom the defendant claims, by reason of the void or voidable nature of the lease of 1786. But those leases under which the lessors of the plaintiff claim were all made "subject to the building leases so thereof granted;" therefore the lessors of the plaintiff can be in no better condition than the Dean and Chapter would be, supposing the action of ejectment to have been brought on their demise.

We therefore upon the whole are clearly of opinion that the verdict in this case ought to be entered for the defendant.

Verdict to be entered for defendant.

LEGGE *v.* HARLOCK.

1848. *Dec.* 18.

(12 Q. B. 1015—1025; S. C. 18 L. J. Q. B. 45.)

[1015]

Declaration in debt stated a building contract under seal, by which plaintiff covenanted to complete buildings by October 23rd, and defendant to pay him 418*l.* on the completion, and it was further covenanted that, if defendant should order any extra work, he should pay plaintiff its value, or, if he ordered any diminution or omission, plaintiff should allow the value out of the 418*l.* Also that, if the buildings should not be finished on the 23rd October, plaintiff should pay the penalty of 1*l.* per day for every subsequent day employed, as liquidated damages. Provided that, if defendant should require any additional work, plaintiff should be allowed so much extra time beyond 23rd October as might be necessary for completing the same. The plaintiff averred that defendant ordered extra work, which required thirty-one days of additional time, and the value of which was 84*l.*; and that the contract would have been fulfilled by October 23rd, but

(1) The paper-books consisted only of the award, which did not set out the demises. The reporters have ascertained that the demises were: 1. By William Pennington, Thomas Wetherell, William Samuel Stratford, Thomas Fleming and Stephen Hall. 2. By Pennington, Wetherell, and Stratford. 3. By Fleming and Hall. 4. By Charles Pettingal, and by Wetherell, Stratford, Fleming and Hall. 5. By the Dean and Chapter of Canterbury. Taniere appeared and defended for a part of the premises; Barrell and another (see p. 459, note (3), *ante*), for the residue.

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for such orders. And he demanded the 418*l.* (*minus* a sum for diminutions), and 84*l.* for the extra work.

Defendant pleaded, as to 22*l.*, parcel of the debt in the declaration mentioned, that the extra time necessary for completing the additional work was nine days only, but that the plaintiff had exceeded the time ending on 23rd October by thirty-one days, whereby he became liable to pay defendant 22*l.* according to the deed; which 22*l.* defendant offered to set off:

Held, on general demurrer, that the clause for payment of 1*l.* per day applied to the covenant for extra time in respect of extra work, as well as to the clause which fixed a day for completing the contract as originally defined: and that defendant might deduct, in the form of set-off, 1*l.* per day for the number of days by which plaintiff had exceeded the necessary time for completing the extra work.

Also, on special demurrer, that the set-off was not bad because pleaded to the 418*l.*, and the 84*l.* as constituting one debt.

DEBT. The first count of the declaration stated an agreement under seal, between the plaintiff of the one part and defendant of the other, dated 11th October, 1847, whereby the plaintiff covenanted and agreed with the defendant that he, plaintiff, would, on or before the 23rd of October then instant, erect, build and completely finish, on the farm and premises of defendant, situate &c., a barn, waggon-shed and granary, according to the drawings and specification to the deed annexed, and execute all the said works in a workmanlike manner, and to the satisfaction of defendant or his surveyor, and would provide proper materials &c.; and defendant covenanted and agreed to pay plaintiff 418*l.* as soon as the said barn &c. should be completely built and finished, to the satisfaction &c. And it was thereby further agreed (after a clause not now material) as follows:

[1016] "That no alteration of or deviation from the works mentioned and described in the said drawing and specification, which should be made at the request or by the direction of the defendant, his executors, administrators or assigns, or his architect or surveyor, should vitiate or make void that agreement; but that, in case the defendant, his executors, administrators or assigns, should direct any more work to be done to the said barn, waggon-shed and granary than is contained in the said drawing and specification, then the said defendant, his executors or administrators, should pay or cause to be paid unto the said plaintiff, his executors or administrators, so much money as such extra work and the materials used therein should amount to; and that, in case it should be thought proper by the defendant, his executors, administrators or assigns, to direct or cause any part of the work contained in the said drawing and specification to be diminished or omitted, then the plaintiff should deduct and allow out of the said sum of 418*l.* so much money

as the works so to be diminished or omitted should amount to upon a reasonable valuation thereof, any thing therein before contained to the contrary notwithstanding. And also that, if the said barn, waggon-shed and granary should not be erected and finished on the 23rd day of October then next as aforesaid, the plaintiff, his executors or administrators, should be subjected to and should pay to the defendant, his executors, administrators or assigns, the penalty or forfeiture of 1*l.* for each day that might be used for completing the said works over and beyond the said 23rd day of October then next, such penalty to be recovered as liquidated damages in any of her Majesty's courts of record. Provided always *that, in case the [*1017] defendant should require any additional works or things to be done by the plaintiff beside those mentioned in the said drawing and specification, in such case the plaintiff should be allowed so much extra time, beyond the said 23rd day of October then next, as might be necessary for doing and completing the same."

The count then went on to aver that the plaintiff, immediately after execution of the deed, to wit on &c., commenced the erection and building of the barn &c., according to the drawings &c., and provided proper materials &c.; and that plaintiff was then proceeding to completely finish the same on or before the said 23rd day of October next after the making of the said deed: and that, whilst he, the plaintiff, was employed in the erection and building of the said barn, waggon-shed and granary, and before the said 23rd day of October, to wit on 20th October and on divers other days and times during the progress of the said erection and building and before the said 23rd October, the defendant did require additional works and things to be done by the plaintiff besides those mentioned in the said drawing and specification; which said additional works and things so required by the defendant to be done by the plaintiff necessarily required a long space of time, to wit thirty-one days of extra time, beyond the said 23rd October, for the doing and completing the same. The count further stated that the defendant, during the progress of the work and before 23rd October, directed more work to be done to the barn &c. than was contained in the drawing &c., the value of which work &c. was 84*l.*, and also directed work which had been contained in the drawing to be diminished and omitted, to the value of 2*l.*: and that, but for the said extra and additional *work &c., and things required to be done, plaintiff [*1018] would have completely finished the said barn &c. (except so far as diminutions and omissions had been ordered) according to the deed.

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And that plaintiff did (with that exception), within a certain time, to wit thirty-one days, from and after the said 23rd October, in a workmanlike manner, and to the satisfaction of the defendant, erect, build and completely finish the said barn, &c. upon the said farm and premises of defendant according to the drawing &c., together with the said extra work &c., and did provide proper materials &c.; which said space of time beyond the said 23rd October was necessary for doing and completing the said extra works and things so required by the defendant to be done as aforesaid: And the plaintiff in fact says that he has performed and fulfilled all things on the part of him, plaintiff, to be performed &c., according to the true intent &c. of the said deed; whereby and by means of the premises an action hath accrued to plaintiff to demand 416*l.* (being the amount of the 418*l.* after deducting the said 2*l.*), and also 84*l.* the value of the said extra work and of the materials used therein; amounting together to 500*l.*

There were counts for work, labour and materials, and on an account stated.

Plea 1. And the defendant, as to the sum of 22*l.*, parcel of the debt in and by the first count of the declaration above mentioned and demanded, and all causes and cause of action in respect thereof, and as to so much of the first count as relates to a certain space of time beyond the 23rd October therein in that behalf mentioned. and stated to have been necessary for doing and completing the extra work &c. so required by defendant to be done as therein also [*1019] mentioned, saith *that the space of time necessary for the doing and completing by plaintiff of the extra work and additional works and things so required by defendant to be done as in the said first count mentioned, beyond the said 23rd October, was a space of nine days and no more; and that plaintiff was, in pursuance of the said deed in the first count mentioned, and of the proviso therein in that behalf contained, allowed by defendant nine days extra time beyond the said 23rd October, for doing and completing the same: Nevertheless defendant further saith that plaintiff did use thirty-one days over and beyond the said 23rd October for erecting, building and completely finishing the said barn, waggon-shed and granary, and for doing and completing the said extra and additional works and things so required to be done by defendant as aforesaid, being twenty-two days over and beyond the said 23rd October, and over and beyond the said nine days so allowed by defendant and necessary as aforesaid: Whereby, and by force of the said deed, the plaintif

became and was and is liable to pay to the defendant 22*l.*, being at and after the rate of 1*l.* for each of the said extra twenty-two days so used by plaintiff as aforesaid: and the said sum of 22*l.* and every part thereof was, at the time of the commencement of this suit, and still is, due from defendant to plaintiff as aforesaid: which said sum &c.: set-off of this sum against the 22*l.* in the introductory part of the plea mentioned. Verification.

As to the residue of the sum demanded there were pleadings which it is not necessary to state, and which led to issues of facts.

Demurrer to plea 1, assigning several causes which it is unnecessary to set forth. The point principally contested *in the argument was not stated as a ground of demurrer. Joinder. The demurrer was argued in this vacation (1). [*1020]

Watson, for the plaintiff:

The declaration shows that the plaintiff executed the whole work in a time not longer than was necessary for doing it with the additions ordered by the defendant, and that he is therefore entitled to recover the 418*l.*, *minus* 2*l.* to be allowed for deductions. The defendant attempts to set off a penal sum of 22*l.* for days consumed beyond the 23rd of October. But, under the circumstances shown on the record, the agreement for a penal sum was at an end when that day had passed. The bargain for 1*l.* a day related only to such time as the plaintiff might consume after the 23rd October in executing the work as at first contracted for. When extra work had been undertaken, and the time exceeded, the defendant might have stopped any further execution of the contract, or might have brought an action for not completing it in reasonable time: but a stipulated penalty cannot be extended to matters not originally within the stipulation, unless by express agreement. (*Watson* also stated formal objections to the plea, which are noticed in the judgment of the COURT, and of which no further mention is considered necessary.)

Wells, *contrà* (2):

The material cause of action is the non-payment of the price originally contracted for. *There is no demand in respect of the [*1021]

(1) December 6th, before Lord Denman, Ch. J. and Patteson, J.: and December 7th, before Lord Denman, Ch. J., Patteson and Coleridge, JJ.

(2) *Wells* urged that the objection mainly relied upon by *Watson* was not mentioned in the demurrer or statement of points for argument; but *Watson* answered that it was ground for general demurrer and for a writ of error; and the COURT desired to hear *Wells* upon the point. *Watson* cited *Fletcher* v. *Dyche*, 1 R. R. 414 (2 T. R. 32).

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extra work: but the plaintiff alleges that, if such work had not been required, he would have fulfilled the contract within the specified time: and he insists upon the stipulation that, if extra work were required, he was to have extra time in proportion. But the Court will look to the order in which the clauses stand. After the agreement for performance of the work by the 23rd October for 418*l.*, come the stipulations for further payment if extra work should be required, and for deduction if the work should be diminished; and then a distinct clause imposing the forfeiture of 1*l.* per day after 23rd October, with the proviso, which must be deemed a part of that clause, that, if extra work should be required, a reasonable time shall be allowed beyond the 23rd October. The plaintiff insisting on that proviso, the defendant is entitled to restrict its operation by suggesting that the period of time to which the excuse applies is nine days, whereas the plaintiff consumed thirty-one. Then, according to the statement on both sides, the difference between nine and thirty-one days ought to be deducted from the plaintiff's demand, unless it can be held that, as soon as any extra work was ordered and undertaken, the 1*l.* penalty was gone. But there is no authority for this. *Macintosh* v. *Midland Counties Railway Company* (1) may be cited: but that case turned ultimately upon the question whether or not the plaintiff had fulfilled a covenant, which the COURT held to be an independent one, to complete work by a certain day.

(LORD DENMAN, Ch. J.: Do you find any case in which the Courts
[*1022] have extended the liability to *such a penalty as this, where a change has been made as to time?)

Duckworth v. *Alison* (2), though not a direct authority, shows the disposition to give such clauses an enlarged operation. The Court of Exchequer there held that a penalty of so much per week for delay in completing a contract might be set off against charges for extra work. But, further, in the present case, the 1*l.* per day for twenty-two days appears by the pleadings to be rather a debt than a penalty.

Burcham (in the absence of *Watson*), in reply:

The penal sum may be measured against the claim of the contractor where the forfeiture accrues merely by exceeding a specified time; and thus far the two cases mentioned on the other side may apply: but there are no means of making such an adjustment where the question is, whether a reasonable time has been exceeded. The con-

(1) 14 M. & W. 548. (2) 1 M. & W. 412; *S. C.* Tyr. & G. 742.

tract neither ascertains what shall be a reasonable time, nor furnishes a tribunal which can decide it. And the clause imposing a forfeiture per day is not to be incorporated with the subsequent proviso for extra time; they are independent stipulations. Their effect is, as was laid down in *Macintosh* v. *Midland Counties Railway Company* (1), that the contractor is liable to pay the penal sum if the work is not completed by the given day, and that, if by the fault of the other party he has been prevented from completing it in time, and has suffered loss in consequence, he may bring his action for any damages he may have sustained.

(PATTESON, J.: If the covenant and proviso are independent, the deduction from the *plaintiff's demand should be for thirty-one days. The word "allowed" seems inconsistent with your construction. Out of what is the allowance to be, if the proviso is independent of the preceding covenant?) [*1023]

The word "allowed" cannot make the penal clause, which in terms applies only to the non-completion by October 23rd, extend also to the covenant in respect of extra work.

Cur. adv. vult.

LORD DENMAN, Ch. J. now delivered the judgment of the COURT:

This was an action of debt on a building contract, to recover two sums of 416*l.* and 84*l.*; the former alleged to be due as the covenanted price of work done by the plaintiff, the latter as the fair value of extra work ordered by the defendant.

The declaration sets out a deed between the parties, by which it was provided that certain specified work was to be done by the plaintiff for the sum of 418*l.*, but the defendant was to be at liberty to order additional work, or to diminish that specified, and payments or deductions to be made accordingly. It is then stipulated that, if the specified work be not erected and finished on the 23rd October, 1847, the plaintiff should pay 1*l.* for every day that might be used over and beyond the 23rd October, as liquidated damages. Provided that, in case the defendant should require additional works, the plaintiff should be allowed such extra time beyond the 23rd October as might be necessary for doing and completing the same.

The declaration then states that the defendant did require additional works, the value of which was 84*l.*, *and that he made slight diminutions, to the value of 2*l.*: that the plaintiff would have erected and finished the specified works on the 23rd October but for the [*1024]

(1) 14 M. & W. 548, 558.

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additional works ordered: that he did complete the whole within a certain time, to wit thirty-one days after the 23rd October; and that such extra time was necessary to complete the additional works.

The defendant pleads, as to 22*l.*, parcel of the sums claimed in the first count, and as to the extra time mentioned in that count, that nine days only beyond the 23rd October were rendered necessary by the additional works, but that thirty-one days were used; whereby plaintiff became liable to pay 22*l.* for the twenty-two days not rendered necessary; and offers to set off so much.

To this plea there is a special demurrer (1).

The case turns upon the construction of the deed in this respect.

For the plaintiff it was contended that, when additional works had been ordered by the defendant, and any extra time beyond the 23rd October was thereby rendered necessary, the stipulation as to payment of 1*l.* per day was at an end; and that the plaintiff, if liable at all for using more time than was necessary, must be sued in a cross action for damages for not completing within a reasonable time.

We are of opinion that such is not the true construction of the deed, but that the plaintiff is made liable by the deed, *primâ facie*, to pay 1*l.*, per day for every day actually used by him beyond the 23rd October; allowing him, however, (that is, not charging him [*1025] for) so many of the days so used as were rendered necessary *by the additional works. The demurrer admits the allegations of the plea that thirty-one days were actually used, and that nine days only were rendered necessary by the additional works. The defendant, therefore, is entitled to claim and to set off 22*l.* for the twenty-two days not rendered necessary.

It was further objected to the plea that it is pleaded to 22*l.*, parcel not only of the covenanted price but of the value of the additional works: but this we think is not a valid objection; for both are claimed as debts and liquidated sums by the declaration, to which the 22*l.* claimed by the plea, if due at all, may by the general course of law be pleaded by way of set-off. It was further objected that the plea is pleaded as to the extra time mentioned in the declaration, which is insensible. We think that part of the plea is inserted by way of explanation, and is not insensible; but, if it were, it might be rejected as surplusage.

We are of opinion that the plea is good: and judgment must be given for the defendant.

Judgment for defendant.

(1) See p. 465, *ante*.

IN THE COURT OF EXCHEQUER.

WAIT AND ANOTHER *v.* BAKER (1).

1848.
Feb. 5, 7.

(2 Ex. 1—10; S. C. 17 L. J. Ex. 307.)

[1]

The defendant, a corn-factor, residing at Bristol, in December, 1846, wrote to one L., at Plymouth, requesting samples of barley, and to make him an offer of a cargo. In the same month L. wrote to defendant, and sent samples of barley, and offered to sell defendant from 400 to 500 quarters f.o.b., at Kingsbridge, or some neighbouring port, for a certain sum, for cash, on handing bill of lading, or by acceptance, &c. The defendant accepted the terms, subject to L.'s reply. L. acceded to defendant's proposal, and requested defendant to give him instructions about the vessel, in order to get her correctly insured. L. sent the defendant the charter-party (not under seal) of a vessel in which the barley was to be shipped, and which was made in L.'s name. In January, 1847, the vessel was loaded with the barley, and L. received from the master the bill of lading, by which the cargo was deliverable at Bristol to the order of L., or assigns, on payment of freight. Subsequently, L. called at the defendant's counting-house in Bristol, and left the invoice and unindorsed bill of lading; he afterwards called again, when a dispute arose as to the quality of the barley; the defendant, after some further dispute, tendered the amount of the cargo in money to L., who refused to accept it, but took away the bill of lading, and indorsed it to the plaintiffs. The defendant, on the arrival of the vessel, claimed and obtained part of the cargo; but the plaintiffs, on producing the bill of lading, obtained what remained, and paid the freight. The jury found that the defendant did not refuse to accept the barley from L.; that the tender was unconditional; and that he was not an agent entrusted with the bill of lading by defendant: Held, in an action of trover by the plaintiffs for the value of the barley so obtained by the defendant, that no property in the cargo passed to the defendant, either by the transaction at Bristol or by the shipment of the cargo on board the vessel by L., and that, therefore, the plaintiffs were entitled to recover.

TROVER for 500 quarters of barley. Pleas, Not guilty, and not possessed; upon which issue was joined.

At the trial, before Williams, J., at the last Spring Assizes for Somersetshire, the following facts appeared: The defendant, a corn-factor at Bristol, had occasional dealings with a person of the name of Lethbridge, who was also a corn-factor at Plymouth, and on the 5th of December, 1846, wrote to him the following letter:

"I hear that the crop of barley in the south of Hampshire *is [*2]
good this year, and that at Kingsbridge the price is low, compared with the markets further eastward. If you are doing anything in the article this season, and can make me an offer of a cargo, I have no doubt but we may have a transaction. Let me hear from you in due course. Send me sample in letter, describing weight," &c.

(1) See the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), secs. 17, 18, and 19, and *Mirabita* v. *Imperial Ottoman Bank* (1878) 3 Ex. Div. 164, 169.—J. G. P.

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To which Lethbridge wrote the following answer on the 9th of that month:

"I beg to inform you that I have not yet commenced buying barley in Kingsbridge market, farmers there standing out for 10*s.* a bag. After Saturday's market I will send you a sample and an offer, if possible."

On the 14th, Lethbridge wrote the following letter to the defendant:

"I herewith hand you samples of common and chevalier barley of the neighbourhood of Kingsbridge, and will engage to sell you from 400 to 500 quarters f.o.b. barley at Kingsbridge, or neighbouring port, at 40*s.* per quarter common, and 42*s.* per quarter chevalier, in equal quantities, for cash, on handing bills of lading, or acceptance at two months' date, adding interest at the rate of 5*l.* per cent. per annum, subject to your reply by course of post."

On the 16th, the defendant returned the following reply:

"I beg to accept your offer of 250 quarters of chevalier barley, at 42*s.* per quarter, and 250 quarters common, at 40*s.* per quarter f.o.b., for cash payments, on receipt of bill of lading and invoice, or acceptance at two months' date, adding interest at the rate of 5*l.* per cent. per annum, subject to your reply by course of post."

On the 18th, Lethbridge wrote the defendant as follows:

"Your favour of the 16th came duly to hand, and note by it
[*3] your acceptance of my offer of barley. I suppose I *am to take up a vessel at the best possible freight I can get her for. Please instruct me in this, and say if for Bristol or any other port."

On the 19th, the defendant wrote in answer:

"I took it for granted that you would get a vessel for the barley I have bought of you f.o.b., and therefore did not instruct you to seek one. I trust that you will be particular to select a good ship, and at the lowest possible freight, for this port; and, above all, take care that the quality of the barley is fully equal to sample. A party, who will take part of it, is extremely particular in these matters; and the samples are sealed and held in the custody of a third party. Please to advise when you have taken up a vessel, with particulars of the port she loads in, so that I may get insurance done correctly."

After some further correspondence respecting the amount of the freight, Lethbridge wrote on the 23rd to the defendant:

"I now send you copy of charter-party of the *Emerald*, which vessel will sail for the port of loading to-day or to-morrow, and I will lose no time in getting her loaded."

The defendant, by letter dated the 24th, acknowledged the receipt of the charter-party (not under seal), which was dated on the 22nd, and was in the name of Lethbridge, to load at Dartmouth, a portion to be filled up at Salcombe, to proceed to Bristol, or any other port.

On the 28th, Lethbridge wrote to the defendant:

"The *Emerald* will commence loading to-day. I hope to hand you bill of lading in the course of the week."

And again on the 1st of January, 1847:

"I hope to be able to send you invoice and bill of lading of *Emerald* on Tuesday or Wednesday."

And on the 6th of January he wrote to the defendant as follows: [4]

"The *Emerald* is nearly loaded; expect the bill of lading to-day or to-morrow. I expect to be in Exeter on Friday, when it is very likely I shall run down and see you."

The vessel was loaded with common and chevalier barley; and on the 7th of January, Lethbridge received from the master the bill of lading of the cargo, which was therein expressed to be deliverable at Bristol to the order of Lethbridge or assigns, paying the freight as per charter. On the 8th, Lethbridge called upon the defendant at Bristol early in the morning, and left at his counting-house the invoice and an unindorsed bill of lading. At a subsequent part of the day, Lethbridge called again upon the defendant, when the defendant raised some objections to the quality of the cargo, and asserted that it was inferior to the samples: he also threatened he would take the cargo, but sue Lethbridge for eight shillings a quarter difference. After some further dispute upon the matter, the defendant offered Lethbridge the amount of the cargo in money, and said that he accepted the cargo. Lethbridge, however, refused to accept the money and to indorse the bill of lading to the defendant; but took the bill of lading from the counter and immediately proceeded to the plaintiffs', who were corn-factors, and had a house of business in the neighbourhood, and indorsed the bill of lading to them, and received an advance upon it. The

WAIT v. BAKER.

market at that time had risen considerably. The *Emerald* arrived on the 16th, and on the 18th the defendant proceeded on board and claimed the cargo as the owner, and unshipped 1,240 bushels of the barley, worth 422*l.* 14*s.*; but the plaintiffs coming on board during the time the cargo was being unshipped, presented the bill of lading and obtained the rest of the cargo, and paid the captain the freight.

[5] The jury found that the defendant did not refuse to accept the barley from Lethbridge; that the tender was unconditional; and that Lethbridge was not an agent intrusted with the bill of lading by the defendant. His Lordship thereupon directed a verdict to be entered for the plaintiffs for 422*l.* 14*s.*, reserving leave to the defendant to enter a verdict for him.

A rule to show cause having been obtained,

Crowder, *Barstow*, and *Greenwood* appeared to show cause, but were stopped by the COURT, who called upon

Butt and *Montague Smith*, in support of the rule:

In this case the property in the barley, which came to Bristol in the *Emerald*, passed to the defendant. Although, in general, it is necessary, in order to pass the property in goods shipped on board a vessel, that the bill of lading should be indorsed to the party claiming the property, that is not the only mode as between vendor and vendee, where they are the parties to the original contract. And payment is not a condition precedent. Here the barley was put on board at the risk of the vendee—the vessel was hired by him, although the charter-party was made in Lethbridge's name; and it is submitted that he was the defendant's agent for this purpose. The vendee would have been liable for freight; the contract, although made for the vendee by the vendor, was, in this respect, the same as if it had been made by a third party. The charter-party was not under seal. In the letter of the 19th of December, the defendant requested Lethbridge to get a proper vessel, in order that he (the vendee) "might get the insurance done correctly." It is clear that the intention of the parties was, that the vessel should be the vendee's, and that the risk should be his. The cargo was to be free on board. There was, therefore, a delivery on board the defendant's ship, and an appropriation of the cargo.

[*82] (PARKE, B.: At what moment *was the acceptance of the cargo

complete? Appropriation may mean that there has been a selection, or an agreement that a particular cargo shall be the thing transferred. Property never passes, unless there be some agreement to the effect that the property shall pass. By the English law, property may pass by an agreement; but the rule is otherwise in the Roman law. The property surely has passed in the present case, by the indorsement of the bill of lading, to the plaintiffs.)

The lien of Lethbridge was at an end when the money was tendered at Bristol, and when the defendant said, "I accept that particular cargo of 500 quarters."

(ROLFE, B.: The jury do not find an unconditional tender and acceptance of the money.

ALDERSON, B.: It is clear that what took place at Bristol was not sufficient to pass the property. You must therefore show, independently of that proceeding, that the property passed; for the defendant there disputed the quality of the corn, and the parties did not agree as to the thing.)

In *Ogle* v. *Atkinson* (1), A., being indebted to the plaintiff, accepted an order to purchase goods for him of R., and put them on board the plaintiff's vessel, sent for them as the plaintiff's goods, advised him of the shipment for the plaintiff's risk and on his account, and remitted him the invoices. He procured the master to sign bills of lading to the order of blank, assuring him it was immaterial. He then drew on the plaintiff, and transmitted the bills and bill of lading to an agent in this country, with instructions that, if the plaintiff did not accept the bills, the agent should indorse over the bill of lading to the payee of the bills, which was accordingly done. And it was there held, that the property in the goods was changed by the delivery on board the plaintiff's ship; and that the subsequent indorsement of the bill of lading was inoperative. That case is similar to the present.

(ALDERSON, B.: There the ship was the plaintiff's; the indorsement of the bill of *lading was an after-thought.) [*7]

(They also referred to *Coxe* v. *Harden* (2).)

(1) 15 R. R. 647 (5 Taunt. 759). (2) 7 R. R. 570 (4 East, 211).

WAIT v. BAKER.

PARKE, B.:

I am of opinion that the rule in the present case ought to be discharged. It is perfectly clear that the original contract between the parties was not for a specific chattel. That contract would be satisfied by the delivery of any 500 quarters of corn, provided the corn answered the character of that which was agreed to be delivered. By the original contract, therefore, no property passed; and that matter admits of no doubt whatever. In order, therefore, to deprive the original owner of the property, it must be shown in this form of action—the action being for the recovery of the property—that, at some subsequent time, the property passed. It may be admitted, that if goods are ordered by a person, although they are to be selected by the vendor, and to be delivered to a common carrier to be sent to the person by whom they have been ordered, the moment the goods, which have been selected in pursuance of the contract, are delivered to the carrier, the carrier becomes the agent of the vendee, and such a delivery amounts to a delivery to the vendee; and if there is a binding contract between the vendor and vendee, either by note in writing, or by part payment, or subsequently by part acceptance, then there is no doubt that the property passes by such delivery to the carrier. It is necessary, of course, that the goods should agree with the contract. In this case, it is said that the delivery of the goods on ship-board is equivalent to the delivery I have mentioned, because the ship was engaged on the part of Lethbridge as agent for the defendant. But assuming that it was so, the delivery of the goods on board the ship was not a delivery of them to the defendant, but a delivery to the captain of the vessel, [*8] to be carried under a bill of lading, and that bill of *lading indicated the person for whom they were to be carried. By that bill of lading the goods were to be carried by the master of the vessel for and on account of Lethbridge, to be delivered to him in case the bill of lading should not be assigned, and if it should, then to the assignee. The goods, therefore, still continued in the possession of the master of the vessel, not as in the case of a common carrier, but as a person carrying them on behalf of Lethbridge. There is no breach of duty on the part of Lethbridge, as he stipulates under the original contract that the price is to be paid on the delivery of the bill of lading. It is clearly contemplated by the original contract, that, by the bill of lading, Lethbridge should retain control over the property. It seems to me to follow that the delivery of the 500 quarters to the captain, to be delivered to Lethbridge, is

not the same as a delivery of 500 quarters to a common carrier by order of the consignee. The act of delivery, therefore, in the present case, did not pass the property. Then, what subsequent act do we find which had that effect? It is admitted by the learned counsel for the defendant, that the property does not pass, unless there is a subsequent appropriation of the goods. The word "appropriation" may be understood in different senses. It may mean a selection on the part of the vendor, where he has the right to choose the article which he has to supply in performance of his contract; and the contract will show when the word is used in that sense. Or the word may mean, that both parties have agreed that a certain article shall be delivered in pursuance of the contract, and yet the property may not pass in either case. For the purpose of illustrating this position, suppose a carriage is ordered to be built at a coachmaker's, he may make any one he pleases, and, if it agree with the order, the party is bound to accept it. Now suppose that, at some period subsequent to the order, a further bargain is entered into between this party and the coachbuilder, *by which it is agreed [*9] that a particular carriage shall be delivered. It would depend upon circumstances whether the property passes, or whether merely the original contract is altered from one which would have been satisfied by the delivery of any carriage answering the terms of the contract, into another contract to supply the particular carriage,—which, in the Roman law, was called *obligatio certi corporis*, where a person is bound to deliver a particular chattel, but where the property does not pass, as it never did by the Roman law, until actual delivery; although the property, after the contract, remained at the risk of the vendee, and if lost without any fault in the vendor, the vendee, and not the vendor, was the sufferer. The law of England is different: here, property does not pass until there is a bargain with respect to a specific article, and everything is done which, according to the intention of the parties to the bargain, was necessary to transfer the property in it. "Appropriation" may also be used in another sense, and is the one in which *Mr. Butt* uses it on the present occasion; viz., where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it. It is contended in this case that something of that sort subsequently took place. I must own that I think the delivery on board the vessel could not be an appropriation in that sense of the word. It is an appropriation in the first sense of the word only; the vendor has made his election to deliver

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those 500 quarters of corn. The next question is, whether the circumstances which occurred at Bristol afterwards amount to an agreement by both parties that the property in those 500 quarters should pass. I think it is perfectly clear that there is no pretence for saying that Lethbridge agreed that the property in that corn should pass. It is clear that his object was to have the contract repudiated, and thereby to free himself from all obligation to deliver the cargo. On the other hand, as has been observed, the [*10] defendant wished to obtain the cargo, and *also to have the power of bringing an action if the corn did not agree with the sample. It seems evident to me that, at the time when the unindorsed bill of lading was left, there was no agreement between the two parties that that specific cargo should become the property of the defendant. If that is so, the case remains, as to the question of property, exactly as it did after the original contract. There is a contract to deliver a cargo on board, and probably for an assignment of that cargo by indorsing the bill of lading to the defendant; but there was nothing which amounted to an appropriation, in the sense of that term which alone would pass the property. The result is, that, in this action of trover, the plaintiffs, claiming under Lethbridge by the indorsement of the bill of lading, are entitled to the property; and then Mr. Baker has his remedy against him for the non-fulfilment of his contract, which he certainly has not fulfilled.

ALDERSON, B.:

I am of the same opinion. The circumstances of the case clearly show that, when the cargo was put on board the vessel, the property in the cargo did not pass. The vendor, at that time, chooses a certain quantity of corn, which he intends to offer to the party in performance of his contract; but he keeps it as his property in the meantime. Such being the state of matters, the property in that state arrives at Bristol, and there is nothing to show that there was any transaction which amounted to an agreement between the parties to alter that arrangement; therefore the property did not pass at all; and as the one party has not tendered the barley in discharge of his contract, the other party has his action against him.

ROLFE, B., and PLATT, B., concurred.

Rule discharged.

HIBBERD *v.* KNIGHT.

1848.
Feb. 9.

[11]

(2 Ex. 11—12; S. C. 17 L. J. Ex. 119; 12 Jur. 162.)

If an action on a covenant by lessee against lessor, where the lease had been executed by defendant's agent under a power of attorney, upon whom a *subpœna duces tecum* had been served, but not in proper time: Held, that secondary evidence of the contents of the power of attorney ought not to be admitted.

An attorney cannot be compelled by the Court to disclose the contents of a client's deed in his possession, but if he do so willingly the evidence may be received.

COVENANT on an indenture of lease. Plea (amongst others), *non est factum*.

At the trial of the cause, before Williams, J., at the last Summer Assizes for Somersetshire, it appeared that the action was brought by the plaintiff, the lessee, against the defendant, the lessor, for the breach of certain covenants in an indenture of lease entered into by them. The defendant was possessed of large landed estates in this country, but resided abroad, and the management of his affairs had for a long time been in the hands of his son, who acted under a power of attorney. The lease in question was executed by the son, for the defendant, under this power of attorney. The son, who was called as a witness, failed to produce the power of attorney. A *subpœna duces tecum* had been served on him, but at too late a period. The learned Judge admitted secondary evidence of the contents of the power of attorney; and the plaintiff had a verdict, with leave reserved to the defendant to move to enter a nonsuit.

Crowder having obtained a rule *nisi*,

Kinglake, Serjt., now showed cause:

This power of attorney was as material a document as the lease itself, and must be taken to have been in custody with the lease. The custody of the son was the proper custody. There was evidence that he alone managed all the business, and that his father never interfered.

ROLFE, B.: The lessor is the most unlikely person to have the lease.

ALDERSON, B.: Of the three parties, either the lessee or his attorney would properly have the custody of it.)

The service of a *subpœna duces tecum* was not necessary.

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Crowder, contrà, was not called upon.

[12] PARKE, B.:

The rule in this case must be made absolute. This power of attorney is the deed of the attorney to whom it was given, and he is to keep it, and under it to show that he has authority for what he has done. The witness should have been duly served with a *subpœna duces tecum*; and in case he had not produced the deed, he might have been punished. The case of *Marston* v. *Downes* (1) is often referred to. There a witness, an attorney, refused to produce a title-deed because it was his client's, but he told the contents of the deed willingly. My brother *Ludlow* objected to the evidence, not on the ground that the attorney was privileged, but that no secondary evidence could be given of the deed, which was itself in existence. My brother PATTESON ruled that secondary evidence might be given, as the party was not obliged to give up his deeds, and that, if the attorney did not insist upon his privilege, but chose willingly to disclose the contents of them, the evidence might be received. Thus explained, the case is correct. Where a deed is in the possession of a person which he is not obliged to produce under a *subpœna duces tecum*, you may give secondary evidence of its contents, as you have done everything to obtain it. The cases of *Ditcher* v. *Kenrick* (2) and *Doe* d. *Gilbert* v. *Ross* (3) are authorities which show this.

ALDERSON, B.:

The second point in the case of *Marston* v. *Downes* requires explanation. It would seem, from the report of that case, that an attorney can be compelled by the Court to divulge the contents of his client's deed. The Court will hear him, and receive his evidence, if he does so willingly, but the Court cannot insist upon it.

ROLFE, B. and PLATT, B. concurred.

Rule absolute.

(1) 6 Car. & P. 381.
(2) 1 Car. & P. 161.
(3) 56 R. R. 639 (7 M. & W. 102).

MOON *v.* DURDEN.

1848.
Feb. 18.

(2 Ex. 22—45; S. C. 12 Jur. 138.)

[22]

The general rule in construing recent statutes is, "*Nova constitutio futuris formam imponere debet, non præteritis;*" but that rule, which is one of construction only, will yield to a sufficiently expressed intention of the Legislature that the enactment should have a retrospective operation:

Held, per PARKE, B., ALDERSON, B., and ROLFE, B. (PLATT, B., *dissentiente*), that the 18th section of the Gaming Act, 1845, had not a retrospective operation, so as to defeat an action for a wager, commenced before the statute passed.

ASSUMPSIT. The declaration, which bore date the 1st of December, A.D. 1845, stated that the defendant had been summoned by virtue of a writ issued on the 12th of June, A.D. 1845. It then alleged, "that, before and at the time of the making of the agreement and promise of the defendant, a certain race for certain stakes of great value, to wit, the sum of 2,000*l.*, had been run over the Epsom race-course, to wit, at Epsom, and a certain horse called Running Rein, and a certain other horse called Orlando, and also certain other horses, had then run the said race, over the said race-course, for the said stakes; and the said horse called Running Rein had then reached the winning-post before the other horses so running as aforesaid, and had beaten them, the said other horses, by speed; and after the running of the said race, and before and at the time of the making of the agreement and the promise of the defendant, a certain question and dispute then arose as to *whether the said [*23] Running Rein was duly qualified or not for the running and for being entered to run the race, and as to whether the said Running Rein was or was not duly entitled to the said stakes, and duly qualified to be the winner thereof, and as to whether the said Running Rein would or would not obtain the said stakes; and thereupon heretofore, to wit, on the 22nd of May, A.D. 1844, it was agreed by and between the plaintiff and the defendant, that if the said horse called Running Rein should obtain the said stakes, on account of having run the said race, the plaintiff should pay to the defendant the sum of 5*l.*; but that if the said horse called Running Rein should not obtain the said stakes for having run the said race, he (the defendant) should pay to the plaintiff the sum of 50*l.*" The declaration then alleged mutual promises, and averred that "the said Running Rein never did nor has obtained the said stakes for having run the said race, but that, on the contrary thereof, the said stakes were obtained by and given to the owner of the said other horse called Orlando." Breach, non-payment of the said sum of 50*l.*

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Demurrer, and joinder.

Lush argued in support of the demurrer in last Michaelmas Vacation, (Dec. 8):

The 8 & 9 Vict. c. 109, s. 18, enacts, "That all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." The first branch of the section is, no doubt, prospective only: but the second is retrospective. If the Legislature had only intended to prohibit future wagering contracts, it would have been sufficient to have declared them "null and void;" but the second branch of the clause, which says that "no suit shall be brought or maintained," [*24] clearly shows that the *enactment was intended to have a retrospective operation. The word "maintained," when used with reference to actions, means "continued" after they have been brought.

(PARKE, B.: Is not the true construction this, "no action shall hereafter be brought, or, if brought, shall be maintained?")

In that view, no effect would be given to the latter part of the section, and the Legislature must have intended something more; for it would be useless to enact that no action should be "brought" or "maintained" upon a contract already declared null and void. Besides, the subsequent words are, "for recovering money or other valuable thing which shall have been deposited." If intended to apply to future transactions only, the words would have been, "which shall be deposited." Notwithstanding the general rule as to the prospective effect of recent statutes, there are cases in which new enactments have been held to apply to past transactions. Where a plaintiff sued, in Hilary Term, 1829, on a debt which accrued more than six years before, the Court of Common Pleas held that the 9 Geo. IV. c. 14, which came into operation on the 1st of January, 1829, precluded him from recovering on an oral promise to pay the debt made by the defendant in February, 1828: *Towler* v. *Chatterton* (1). In the judgment in that case, reference is made to two Nisi Prius decisions, one before Hullock, B., and the

(1) 6 Bing. 258.

other before Lord Tenterden, in which those learned Judges ruled that the statute applied to the case of actions brought before the 1st of January, 1829, but in which the trials did not take place until after that time; although the effect of such a construction was to deprive the parties of their vested right to recover the debts. The case of *Edmonds* v. *Lawley* (1), in which it was held that the 2 & 3 Vict. c. 29, s. 2, was not retrospective, is distinguishable, because the words of that statute are general, and capable of an interpretation either way. Here the word "maintained" has been advisedly *used by the Legislature for the purpose of stopping wagering suits already commenced. Any other interpretation would be equivalent to striking that word out of the section.

[*25]

(PARKE, B.: The case of *Edmonds* v. *Lawley* is decisive in principle. The COURT there held, that if a *fiat* had issued, and assignees had been appointed before the passing of the 2 & 3 Vict. c. 29, s. 2, they would have had a vested right to the property of the bankrupt from the time of the seizure; and it would be unjust to construe the Act so as to defeat that right. In *Nelstrop* v. *Scarisbrick* (2) we also held that the statute ought to be construed so as to give effect to vested rights; and that decision was confirmed by *Moore* v. *Phillips* (3).)

The object of the 8 & 9 Vict. c. 109, was to prevent parties from making courts of law instrumental in recovering wagers; and that can only be done by giving the statute a retrospective effect.

Bramwell, contrà:

The enactment is prospective only. If the latter part of the section be read as applying to those contracts which are annulled in the former part, the whole is consistent. The construction will then be that all wagering contracts shall be null and void, and no action shall be brought or maintained in respect of them. To hold that the word "maintained" does not apply to all actions to which the word "brought" applies, would be to hold that the Legislature has prohibited the "bringing" of an action independently of the "maintaining" of it. But no statute can prevent the "bringing," though it may the "maintaining" of an action. The true construction, therefore is, "no action shall be brought, or being

(1) 6 M. & W. 285.
(2) 6 M. & W. 684.
(3) 7 M. & W. 536.

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brought, maintained." The first part of the section puts an end to suits between the parties to wagers; the second part relates to stakeholders, who would otherwise be liable to actions for the recovery of a thing, in specie or money, deposited with them to abide the event of wagers. If, in this case, the statute had passed after verdict, and before judgment, according to the argument on [*26] *the other side, it would have been illegal to enter up judgment. The 15th section repeals certain statutes relating to gaming, except as to penalties incurred before a certain day. Then the 16th section enables persons, sued for penalties, to obtain an order to discontinue, on payment of costs. But the statute contains no provision for discontinuing actions for wagers already commenced, which shows that the Legislature did not intend to defeat existing rights in that respect. Where the law is altered by statute, pending an action, the law as it existed when the action was commenced must decide the rights of the parties, unless the Legislature, by the language used, show a clear intention to vary the mutual relation of such parties: *Hitchcock* v. *Way* (1).

Lush replied.

Cur. adv. vult.

The COURT having differed in opinion, the learned Judges now delivered their judgments *seriatim.*

PLATT, B.:

This action was brought on the 12th of June, 1845. In December, 1845, the plaintiff declared upon a wager alleged to have been won on a horse-race. The defendant demurred to the declaration. The question raised by this demurrer is, whether the plaintiff was barred, by the 18th section of the 8 & 9 Vict. c. 109, from maintaining his action. The statute received the Royal assent on the 8th of August, 1845; and the 18th section enacts, "that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, should be null and void; and that no suit should be brought or maintained in any court of law or equity, for recovering any sum of money or valuable thing, alleged to be won upon any wager, or which should have been deposited in the hands of any person to abide the event on which any wager should have been made."

[*27] The general rule, governing the construction of statutes, *is

(1) 45 R. R. 653 (6 Ad. & El. 943).

correctly stated in Bac. Abr. 439, "Statute," C. It is there laid down as in general true, "that no statute is to have a retrospect beyond the time of its commencement; for the rule and law of Parliament is, that *nova constitutio futuris formam debet imponere, non præteritis;*" and *Gilmore* v. *The Executors of Shooter* (1) is quoted as an example. In that case, a treaty of marriage being on foot between the plaintiff and a person whom he afterwards married and had 2,000*l.* with as a portion, Shooter, who was of kin to the plaintiff, promised to give him as much, or to leave him as much by his will. This promise was made before the 24th of June, 1677. Shooter died in September following, without having paid the money, or made provision by his will for the payment thereof. An action was brought against the executors of Shooter, and the question made upon the special verdict was, whether the promise, not being in writing, was within 29 Car. II. c. 3, whereby it is enacted, "that, from and after the 24th of June, 1677, no action shall be brought to charge any person upon any agreement made upon consideration of marriage, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged." Judgment was given for the plaintiff. And, per CUR., it cannot be presumed that this Act was to have a retrospect, so as to take away a right of action which the plaintiff was entitled unto before the time of its commencement. It should, however, be observed, that the form of the condition, on which the right to bring an action was made to depend, imported that future agreements alone were required to be written and signed. The words are "unless the agreement shall be in writing, and signed." But the general rule is not without exception. A statute may have a retrospect to a time antecedent to that of its commencement. Thus, a statute which compels a covenantor to do an act, which before the passing of the *statute he had covenanted not to do, or which forbids his doing an act, which he had before the passing of the statute covenanted to do, repeals the covenant: *Brewster* v. *Kitchell* (2). The 9 Geo. IV. c. 14, s. 1, enacts, "that in actions grounded on any simple contract, no acknowledgment or promise shall be deemed sufficient evidence of a new or continuing contract, whereby to take the case out of the operation of the 21 Jac. I. c. 16, unless such acknowledgment or promise shall be made or contained by or in some writing, to be signed by the party chargeable." That statute

[*28]

(1) 31 R. R. 412, *n.* (2 Mod. 310). (2) 1 Salk. 198.

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was to take effect on and after the 1st of January, 1829, and has been construed to render insufficient all proof, adduced after the 31st of December, 1828, of an unwritten acknowledgment or promise; although, by such a construction, the statute is made to operate retrospectively, in avoidance of all acknowledgments and promises expressed before the 1st of January, 1829: *Towler* v. *Chatterton* (1), *Ansell* v. *Ansell* (2), *Amner* v. *Cattle* (3). By the 3 & 4 Will. IV., c. 42, s. 31, personal representatives failing in their suits are subject to costs. This statute has been held, by the Courts of Queen's Bench and Exchequer, to operate retrospectively, and to render executors and administrators who had brought their actions before it passed, liable: *Freeman* v. *Moyes* (4), *Pickup* v. *Wharton* (5), *Grant* v. *Kemp* (6). The former of these two statutes intended to abolish an unsatisfactory means of proof; and the latter, the anomaly of allowing a plaintiff, because he sued in a representative character, to escape the just penalty of paying the costs occasioned by his having brought a desperate and ill-founded action.

The 8 & 9 Vict. c. 109, intended to prevent for the future her Majesty's courts of justice from being required to execute the unworthy office of deciding a gambling controversy, or of compelling, by their process, the payment of a wager.

[29] By adhering to the express provisions of the 9 Geo. IV. c. 14, s. 1, and the 3 & 4 Will. IV. c. 42, s. 31, the Courts have applied the remedies intended.

By a like course alone will this Court accomplish the object of the Legislature in penning the 18th section of the 8 & 9 Vict. c. 109. In that section the Legislature appears to me to have intended to deal with subsisting, as well as with future, contracts by way of gaming or wagering. After annulling future contracts of that description, any further provision as to them, or as to any proceedings upon them, was unnecessary. The enacting part of the section might have stopped at the end of the declaration that such contracts should be null and void. The next provision, therefore, must be taken to deal with money or other valuable things alleged to be won upon such wagering contracts as subsisted on the 8th of August, 1845; and as to them, to incapacitate the winner from bringing or maintaining in any court of law or equity a suit for their recovery. The words are, "and that no suit shall be brought

(1) 3 Moo. & P. 619.
(2) 3 Car. & P. 563.
(3) 2 Moo. & P. 367; 9 Bing. 258.
(4) 1 Ad. & El. 338.
(5) 2 Cr. & M. 405.
(6) *Id.* 636.

or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made." In any way of reading this part of the section, it is impossible to prevent its operating to defeat the rights vested in the winners to recover, if they shall have failed to bring their actions before the 8th of August, 1845. But upon what principle can it be urged, that one of two persons, each having won a bet on the same day, and upon the same event, shall be entitled to recover, because he shall have brought his suit the day next before the Act received the Royal assent; and the other, who shall have brought his suit two days later, shall be barred altogether? It seems to me that the Legislature, contemplating the injustice of allowing such a distinction, has advisedly introduced the words "or maintained," in order to extend equally to both the incapacity to recover. The Legislature has used the *word "maintained" alternatively: are we to say it [*30] has no distinct meaning? *Dixit:* are we to say *non voluit?* The verb "to maintain," in pleading, has a distinct technical signification. It signifies to support what has already been brought into existence. Thus, a defendant, who admits the right of a plaintiff to bring, or to bring and up to the last pleading maintain, his action, but relies on matter disabling him from further proceeding, insists that the plaintiff ought not, by reason of such matter, further to maintain his action. A plea in bar of the further maintenance of the action admits the plaintiff to have properly maintained it up to the time of such plea. In this case, however, the defendant, by his demurrer, objects to the declaration. He says, "Your action was brought properly; but you have no right to maintain it by your declaration, or, in other words, the law has intervened and deprived you of that right." The like intervention deprived the plaintiff in *Kirkhaugh* v. *Herbert*, and the *Anonymous* case also referred to in 5 Bing. 265, of his right of action, and in *Grant* v. *Kemp* (1) and *Freeman* v. *Moyes* (2) of his immunity from the defendant's costs.

In confirmation of the view which I have taken of the 18th section, it should be observed, that the expressions "shall have been deposited," and "shall have been made" appear to have been selected in contradistinction to the words "shall be." If the section was intended to operate prospectively only, the words "shall be" would have been appropriate to its object; but if retrospectively,

(1) 2 Cr. & M. 636. (2) 1 Ad. & El. 338.

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the words "shall have been" would be not only appropriate, but necessary.

The 15th section repealed various legislative provisions against gaming, except as to any penalties incurred on or before the 5th of March, 1844, and for recovering which any suit should have been commenced before the 5th of March in that year. By the 16th section, it is made lawful for any person sued for recovery of any pecuniary penalty incurred on or before the 8th of August, 1845, [*31] under the *provisions of any Act amended or repealed by former sections, to apply to the Court or a Judge for an order that such action shall be discontinued upon payment of the costs incurred on or before the 5th of March, 1844; and every such Court or Judge is required to make such order, and, upon the making such order, and payment or tender of such costs, the action is to be discontinued. The effect of these two sections is to deprive the informer of the penalty in every case altogether, and to impose upon him the payment of the whole of his own costs, if he shall not have brought his action for its recovery on or before the 5th of March, 1844; and of so much of them as he shall have incurred during the fifteen months next before the passing of the Act, if he shall have brought his action on or before that day.

The relief extended by these sections was to the guilty. Those who had not incurred penalties did not require it. I cannot suppose that the Legislature proposed to extend to the gambler suing for money won, protection which it denied to the informer suing for penalties incurred, and which had been imposed on persons guilty of deceitful gaming, and to which the law had given him a distinct title. Yet, if the word "maintained" in the 18th section is to be treated as redundant, and is not to be understood to apply to actions pending, the gambler may recover in his action on a wager, while the informer would be barred from maintaining his action, and would be entitled to a portion only of his costs, should he have been so fortunate as to have done what probably no informer, suing for penalties on the 8th of August, 1845, had done, namely, brought his action on or before the 5th of March, 1844. Practically, the 15th section stripped the informer of the right with which the law had deliberately clothed him, without giving him any compensation for the loss of the penalty or of his costs. And, although it is impossible to escape from giving to the 15th and 16th sections a retrospective operation, the Court is called upon to conclude that [*32] the 18th section was not *intended to operate as extensively against

the gambler, and in order to arrive at that conclusion, to treat as surplusage, or, in other words, to annul, the plainly additional enactment contained in that section.

Upon the whole, taking into consideration the general spirit of the Act, and the nuisance the Legislature sought, by the 18th section, to abate, I think they intended that, from the 8th of August, 1845, when the Act received the Royal assent, her Majesty's courts of law and equity should not be made instrumental in enforcing the payment of a wager; that the supposed vested rights of winners to recover were not contemplated as subjects of legislative protection, but, on the contrary, were absolutely annulled; that, from and after the 8th of August, the winners were barred from bringing, or, if they had then brought them, from maintaining, suits either at law or in equity, to recover the money or valuable thing alleged to be won; and, consequently, that the defendant is entitled to judgment.

ROLFE, B.:

This was an action on a wager. It was commenced on the 12th of June, 1845; and the main question in the case is, whether the effect of the stat. 8 & 9 Vict. c. 109, s. 18, is to disable the plaintiff from maintaining the action. That statute did not receive the Royal assent until August, 1845, after this action had been commenced.

The language of the 18th section is as follows: "And be it enacted, that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to decide the event on which any wager shall have been made."

The effect of this clause is to make void all wagers, and to prevent the bringing or maintaining any action for the recovery of money won on any wager; and the only question *is, whether its operation is retrospective so as to affect past transactions and existing suits. [*33]

The general rule on this subject is stated by Lord Coke, in the second Institute, 292, in his Commentary on the Statute of Gloucester, "*Nova constitutio futuris formam imponere debet, non præteritis;*" and the principle is one of such obvious convenience

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and justice, that it must always be adhered to in the construction of statutes, unless in cases where there is something on the face of the enactment putting it beyond doubt that the Legislature meant it to operate retrospectively.

On the part of the defendant it was argued, that in this statute the clause must have been intended to affect past transactions; because it not only enacts that wagers shall be null and void, but further, that no suit shall be brought or maintained for the recovery of money won on a wager. The latter branch of the clause, it was contended, would have no operation if the enactment were restricted to future wagers; for it would be useless to enact that no action should be brought, and still more so that no action should be maintained, in respect of a contract already declared to be null and void; and particularly the enactment, that no action should be maintained, must, it was said, apply not only to wagers already won, but even to suits already pending for their recovery.

It must be observed that this latter part of the enactment—that, I mean, which prohibits the bringing or maintaining of actions—is in no respect inconsistent with the construction which gives to the enactment an operation merely prospective. The most that can be contended is, that the words in question are unnecessary; and therefore, independent of authority, if the argument rested here, what we should have to decide would be, whether the improbability that the Legislature should unnecessarily prohibit the bringing or maintaining an action on a contract already made void in a prior part of
[*34] the same clause, is so great as *to warrant us in saying that it must have been intended retrospectively to affect rights already vested. I think this would be a very unreasonable and strained inference, and which, considering the ordinary frame and language of Acts of Parliament, would be by no means fairly deducible from the clause in question. But the argument of the defendant did not rest on general reasoning only; he relied on some authorities, in which he contended that the Courts had, notwithstanding the general rule as to the prospective nature of new enactments, held them to apply to past transactions as well as future. The first of these authorities was *Towler* v. *Chatterton* (1). That was an action of *indebitatus assumpsit*, to which there was a plea of the Statute of Limitations. The plaintiff proved a verbal promise to pay, made by the defendant in February, 1828. The action was commenced in January, 1829, and was tried in the spring of that year; and the question was,

(1) 6 Bing. 258; 3 Moo. & P. 619.

whether the verbal promise, in February, 1828, was sufficient to take the case out of the statute, Lord Tenterden's Act (9 Geo. IV. c. 14) having received the Royal assent on the 9th of May, 1828. By the first section of that statute it was enacted, that, in actions of debt or upon the case grounded on any simple contract, no promise by words only should be sufficient to take any case out of the operation of the Statute of Limitations, unless the same should be contained in some writing to be signed by the party. The 10th section enacted that the Act should commence and take effect on the 1st of January, 1829. At the trial, before Best, Ch. J., the plaintiff was nonsuited, on the ground, that the verbal promise, made in February, 1828, was of no avail, for that Lord Tenterden's Act applied to past, as well as future, transactions; and this ruling of the CHIEF JUSTICE was afterwards supported by the Court of Common Pleas. On referring to the judgment of the three learned Judges by *whom that case was decided, it would seem that it was [*35] founded mainly on the 10th section, which enacted that the Act should commence and take effect from the 1st of January, 1829; and from this they inferred that, when that day arrived, the Act was in full operation as to all contracts, past as well as future. Parties, they observed, in possession of parol promises, had seven months and upwards, namely, from May, 1828, to January, 1829, during which to bring their actions; and the inference they seem to draw was, that there would, therefore, be no injustice in giving to the statute, at the end of that time, a full operation, retrospective as well as prospective; and this, they considered, made the case of *Gilmore* v. *Shuter*, to which I shall presently refer, inapplicable as an authority, inasmuch as in that case there was no clause similar to the 10th section in Lord Tenterden's Act. Now, if the meaning of this 10th section be, as the Judges of the Court of Common Pleas, in the earlier part of their judgment, would seem to have supposed, namely, that it was meant to exclude from the operation of the statute all actions brought before the 1st of January, 1829, then the statute would work no real injustice to any one; a salutary change was to be made in the law, and reasonable time, or what was supposed a reasonable time, was given to all parties affected by the change to protect themselves from any ill consequence in respect of vested rights. But the Court of Common Pleas, in support of their judgment, refer to two Nisi Prius cases, one before Mr. Baron Hullock, and the other before Lord Tenterden, in which those learned Judges held the statute to apply to the case of actions

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brought before the 1st of January, 1829, but in which the trials did not occur till after that date, on the ground, apparently, that the Judge at Nisi Prius was to treat the statute as being in force at the time of the trial, and as conclusively binding him with respect to what evidence he was to receive. If this narrow construction is to [*36] be put on the statute, it is obvious that *the 10th section must, in many cases, be a mere illusory protection, and would very often afford no protection at all. It might, perhaps, fairly be assumed that every creditor could commence his action before the 1st of January, 1829; it would be contrary to truth to assume it as certain, or, in many cases, even as probable, that he could, before that day, bring his cause to trial. Lapse of years has made it impossible that this question should ever again arise on Lord Tenterden's Act; and it may, perhaps, therefore seem to be an idle thing to discuss the doctrine involved in the cases to which we have referred. But the principle is one of general application, and may apply to future statutes, as indeed it does to that now before us; and I therefore feel bound to say that I cannot think those Nisi Prius cases rightly decided. Whether the decision in *Towler* v. *Chatterton* was correct, would depend on whether the true meaning of the 10th section was to fix a date before which all actions must be brought, or a date beyond which no parol promise should be sufficient to take a case out of the operation of the Statute of Limitations. The Court of Common Pleas adopted the former construction. Neither construction would do injustice by infringing the rule which in general makes all statutes prospective in their operation, and the Court of Common Pleas may have been right in their view of the statute: at all events, it is immaterial, in the present case, to discuss that point. It is, however, worthy of remark, that Lord Tenterden's Act points to a writing to be signed by the parties—that is, to future acts only; and consequently, the decision, giving to that section a retrospective operation, was not a just one, even in conformity with the most narrow construction of its language.

The only other authority referred to by the defendant, besides that of *Towler* v. *Chatterton* and the Nisi Prius decisions there cited, was a case of *Edmonds* v. *Lawley*, in this Court, reported in 6 M. & W. 285. The case there turned on the construction to be put on the [*37] 2 & 3 Vict. *c. 29, which enacts, among other things, that all executions executed before the issuing of a *fiat* should be valid, notwithstanding any prior act of bankruptcy, provided the execution creditor had no notice of any such prior act of bankruptcy. The

defendant, who was Sheriff of Warwickshire, had seized the goods of a debtor under a *fi. fa.*, and a *fiat* afterwards issued against the debtor, on an act of bankruptcy committed before the seizure, but of which the creditor had no notice; the seizure there took place before, but the *fiat* did not issue till after, the passing of the statute 2 & 3 Vict. c. 29. This Court held that the statute protected the execution against the subsequent *fiat*. But there it will be observed that no vested right was defeated—the right of the execution creditor was complete, unless a *fiat* should afterwards issue: the object of the statute was to prevent the retrospective operation of a *fiat* in all cases where the creditor had had no notice; and we considered the prohibition to apply to every *fiat* to be issued after the passing of the Act. This we considered as an operation merely prospective, interfering with no vested rights. The statute merely provided that future *fiats* should not, by means of the doctrine of relation, have the effect of disturbing prior vested rights. And, in a subsequent case of *Moore* v. *Phillips* (1), we held that the statute did not apply to a case where the *fiat* had issued and assignees had been appointed before the passing of the Act; for this, though the language of the statute might have warranted such a construction, would have been an interference with the vested rights of the assignees, and could not, therefore, be assumed to have been intended by the Legislature.

It remains only to show that the doctrine propounded by Lord Coke does not rest merely on his authority, or on its obvious consonance with natural justice, but has been recognised and acted on in some important and well-considered *cases, very analogous to [*38] that now before us. In *Gilmore* v. *Shuter*, to which I have already alluded, reported in several books, amongst others in T. Jones, 108, 2 Mod. 310, and 2 Show. 16, the action was brought on a marriage contract, made by parol, without writing, before the 24th of June, 1677; and the question was, whether it could be enforced after the passing of the Statute of Frauds. The language of that statute is very strong. The object of the statute, which became law in April, 1677, is declared, in the preamble, to be "for the prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury and subornation of perjury;" and it enacts, among other things, that, after the 24th of June, 1677, "no action shall be brought on any agreement, made in consideration of marriage, unless the agreement on which such action shall be

(1) 7 M. & W. 536.

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brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised." The COURT held that, however general the language of the statute, it could not have been intended to affect past promises, valid when the Act came into operation; and that it must, therefore, be construed as referring to future contracts only; and, according to all the reports of the case, the Court seems to have decided solely on the ground that it would be a flagrant violation of natural justice to make the enactment applicable to existing contracts—even in the case of a statute declared to be necessary for the prevention of fraudulent practices commonly endeavoured to be upheld by perjury. In conformity with this decision, it is stated, in some of the reports of the case, that the Judges had said that an unattested will, made before the passing of the Act, would be good, even though the testator should not die till after it had come into operation. This case seems to me to go much further than that now under consideration.

[*39] On the same principle the Courts acted in cases under *the Mortmain Act, 9 Geo. II. c. 36. That statute enacted that, after the 24th of June, 1736, no lands should be given or settled to charitable uses, except by deed indented and inrolled in manner therein mentioned. Soon after the passing of the Act, a question arose whether it affected wills made before the Act, where the testator died after it had come into operation; and, on a reference to the Judges, they all held that it did not, and Lord HARDWICKE acted on their certificate: *Ashburnham* v. *Bradshaw* (1).

These cases seem to me abundantly to confirm the accuracy of the doctrine as laid down by Lord Coke. I do not mean, of course, to say that an enactment may not be so made as to have a retrospective operation. In some cases the Legislature has thought it just to make enactments retrospective, even at some sacrifice of general principle. But then it does so in express terms; and generally, I believe invariably, couples the retrospective enactment with the best indemnity in favour of vested rights which the nature of the case admits. This very statute (sect. 16) illustrates what I mean. By previous statutes, persons guilty of certain offences connected with wagering had been subjected to pecuniary penalties, to be recovered by common informers. The statutes imposing those penalties are repealed by the statute now under consideration: and the Legislature, deeming it improper that any future penalties

(1) 2 Atk. 36.

should be recovered under the repealed laws, enables any party sued for penalties to obtain an order of the Court or a Judge for discontinuing the action; but this is to be done only on payment of the costs incurred prior to the 5th of March, 1844. Why that day was fixed on, does not appear on the face of the statute; but it probably was the day when the subject was first introduced into Parliament, and when, therefore, notice may be considered as having been given to every one that he would institute any action at his peril. The same course *was adopted by the 54 Geo. III. c. 54, ss. 6, 7, in respect to actions for penalties under the Clergy Residence Act, and by the 2 Vict. c. 12, s. 5, in actions under the Printers' Act; and no doubt there are other similar cases. The absence of any such provision in this Act, as to rights existing when the Act became law, seems to me strongly confirmatory of the view I have taken; and, for the reasons I have already stated, I think that the statute 8 & 9 Vict. c. 109, s. 18, was not meant to affect rights already acquired under wagers made before the passing of the Act; and so that the plaintiff is entitled to our judgment.

[*40]

ALDERSON, B.:

I think also that the plaintiff is entitled to our judgment in this case. In construing statutes, the general rule, as it seems to me, which ought to guide us in their construction, is that which has been stated. They are not to be supposed to apply to a past, but to a future, state of circumstances. Various instances might be adduced to show what extensive consequences might follow if we did not abide by these general principles. For instance, to take one only: The 3 & 4 Vict. c. 113, s. 42, enacts, "That it shall not be lawful for any spiritual person to sell or assign any patronage or presentation belonging to him, by virtue of any dignity or spiritual office held by him; and that every such sale or assignment shall be null and void to all intents and purposes." Now the words "every such sale or assignment shall be null and void to all intents and purposes," might literally apply to the options granted, before the Act, to the Archbishop of Canterbury, by the respective Bishops, on their consecration,—a species of property which hitherto has gone, according to the Archbishop's will, to his executors (1). Could it be supposed that the Legislature intended this without express words? Even the application of this section to future options, which *no doubt was the effect of the clause, was, probably, beyond their

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(1) See 1 Burn's Eccles. Law, 239.

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view. But, in truth, the latter words of the clause are redundant only, not retrospective. Here, no doubt, the Legislature were desirous of putting an end to gaming and wagers; but, unless the words imperatively require it, we ought not to make their prohibition retrospective; for it is contrary to the first principles of justice to punish those who have offended against no law; and surely to take away existing rights without compensation, is in the nature of punishment. The words of the statute do not, as it seems to me, require this construction. The first clause of the section is probably prospective. All contracts, by way of gaming or wagering, are made void. It seems to me, at present, that this applies to the future; and indeed it was, as I understood, so admitted by *Mr. Lush* in his argument. But it was said that the next clause was not so; for that it not merely prohibited the future bringing of suits to enforce wagers, but also the future maintenance of such suits when previously brought. But I cannot give such a construction to what appear to me only redundant words in this section. If it had been stated "that no action shall be brought," or only "that no action shall be maintained," it seems to me clear that we should have considered the words "brought" and "maintained" as synonymous, and as prohibiting the success of future suits alone. And although the use of both in one sentence makes this less obvious, yet, when we consider that to give the more strict interpretation to the word "maintained" will compel us to suppose, without further evidence, that the Legislature contemplated so gross an act of injustice as, without compensation, to take away an existing right of action already pending, and that, too, with no provision even for the costs incurred in the enforcing of what was, before the Act, a legal right, I am not disposed to put such a construction on the word, but to treat it, as I think the Legislature

[*42] intended it, as a redundant expression only. *In the 16th section, where they do speak of existing actions of another sort, they do provide for the staying them, by application to the Court and on payment of costs; and I think, if they had intended to put an end to pending actions of this description, they would have shown it by introducing a similar provision in the 18th section.

It is not necessary to determine whether, by the first part of the 18th section, the Legislature may not have intended to put at once an end to the legal obligation both of existing and future contracts, leaving the parties to all such wagers to act thereafter on them as honourable engagements alone. If any suit shall be hereafter

instituted upon any such previous contract, that question may, perhaps, be open to further argument. But in this case, where the contract existed and the suit was instituted before the Act, it seems to me that the Act does not affect it. I think, therefore, that the plaintiff is entitled to judgment.

PARKE, B.:

The only question in this case is, whether the Act (8 & 9 Vict. c. 109, s. 18) affects existing suits for the recovery of wagers or not. The clause in question having been read, it is unnecessary for me to repeat it.

I have felt a good deal of difficulty in deciding upon the true construction of this clause; but, after much consideration, I agree in opinion with my brothers ALDERSON and ROLFE, that it applies to future actions only.

The language of the clause, if taken in its ordinary sense, as in the first instance we ought to do, applies to all contracts, both past and future, and to all actions, both present and future, on any wager, whether past or future. But it is, as Lord Coke says, "a rule and law of Parliament that regularly, *nova constitutio futuris formam imponere debet, non præteritis*" (1). This rule, which is in effect, that enactments in a statute are generally to be construed to be prospective, *and intended to regulate the future conduct of persons, [*43] is deeply founded in good sense and strict justice, and has been acted upon in many cases. For instance, in the construction of the Statute of Frauds, which was held not to apply to promises made before the 24th of June, 1677: *Gilmore* v. *Shuter* (2); and also of the stat. 2 & 3 Vict. c. 29, which, it has been decided, is not to be construed to defeat a right by relation already vested in an assignee of a bankrupt: *Edmonds* v. *Lawley* (3); *Moore* v. *Phillips* (4).

But this rule, which is one of construction only, will certainly yield to the intention of the Legislature; and the question in this and in every other similar case is, whether that intention has been sufficiently expressed. Upon that question it is that I have felt considerable doubt.

It seems a strong thing to hold, that the Legislature could have meant that a party, who, under a contract made prior to the Act, had as perfect a title to recover a sum of money, as he had to any of his personal property, should be totally deprived of it without

(1) 2 Inst. 292.
(2) T. Jones, 108; 2 Show. 16.
(3) 6 M. & W. 285.
(4) 7 M. & W. 536.

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compensation. It is a still stronger thing to hold, that, if he has already commenced an action with an undoubted right to recover his debt and costs, he should not only forfeit both, but also be liable, as he would in the ordinary course of a suit, to pay the costs of his adversary, by being obliged to discontinue, or be nonprossed, or have his judgment arrested. These considerations afford a strong reason for limiting the operation of the words of this section, and holding that they apply to future contracts, and actions on such future contracts only—at all events, to future actions only, if any distinction can be made in the degrees of apparent injustice. But, on the other hand, it is to be recollected that the toleration of actions for wagers, on subjects in which the parties have no real interest, has often been made a subject of reproach to the law of [*44] England; and *it is not a matter of surprise, that the Legislature took an early opportunity of putting a stop to them; and also it is to be borne in mind, that the parties who would suffer by a strict construction of the clause, are often successful gamesters or speculators, not much the objects of favour with the Legislature: and one considers the clause, therefore, not quite in the same spirit, as if the enactment related to ordinary contracts.

The enactment, "that all contracts or agreements, by way of gaming or wagering, shall be null and void," if it stood by itself, ought most clearly to be construed as applicable to future contracts and agreements only, by virtue of the rule of construction to which I have adverted, and the apparent injustice of putting an end to a vested right. So, if the next part stood alone, it would, I think, though not so clearly, be construed, for the same reason, to apply to future actions only; and the clause, to avoid the injustice which would otherwise be inflicted on a plaintiff, should be construed to mean, not that an action already brought should not be maintained, but that no action should afterwards be brought, or, if brought, maintained; and the absence of any provision that the costs of an existing action should be paid by a defendant, in my mind, strongly favours that construction. The union of the two clauses together does not appear to me to make any difference. The latter clause is surplusage, so far as it relates to bringing actions, whether we construe the former to apply to future or existing contracts; and the only observation that can be made is, that in one mode of construing the enactment the word "maintained" is inoperative, in the other it is not. It is redundant, unless it applies to the maintenance of an existing action; but this circumstance of mere redundancy does

not appear to me to be sufficient to show, that the Legislature meant to do so unjust a thing as to prevent the maintenance of an existing well-founded action. I think it best to abide by the sound rule of construction above referred to, notwithstanding the conjectures *as to the real intention of the Legislature, which the nature of the subject occasions. I therefore hold that, at all events, this action is maintainable, and am disposed to say that the clause affects none but future wagers; and, consequently, that the plaintiff is entitled to our judgment.

[*45]

Judgment for the plaintiff.

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1848. *Feb.* 7.

(2 Ex. 45—51; S. C. 18 L. J. Ex. 77.)

[45]

A declaration, after reciting that defendant was possessed, for the residue of a term of years, of a certain messuage and premises, and also of certain fixtures annexed to the premises, averred that plaintiff agreed with defendant to purchase of him the residue of the term of the said messuage and premises, with the appurtenances and the said fixtures, and defendant, amongst other things, agreed to give up possession of the messuage, with the appurtenances and the said fixtures, on a certain day. The declaration then averred that plaintiff tendered to defendant, for execution, an instrument which, amongst other things, contained a recital that plaintiff had lately contracted with defendant for the sale to him of the residue of the term granted to him by one J. P., in the messuage or tenements and hereditaments, &c., with their appurtenances, and also all and singular the fixtures belonging to the said messuage or tenements and hereditaments, for a certain sum, the receipt of which was thereby acknowledged: Held, on motion in arrest of judgment, that, as the agreement between the parties was for the assignment of the fixtures only, which belonged to defendant, the recital in the instrument tendered was too large, and therefore that it was not such a one as defendant was bound to execute; and the judgment was arrested.

ASSUMPSIT. The declaration stated, that the defendant, at the time of the making of the agreement thereinafter next mentioned, was lawfully possessed, for the then residue of a certain term of years, to wit, a term of fourteen years computed from the 12th day of May, 1846, of a certain messuage and premises, called &c., with the appurtenances; that the defendant was so then possessed as aforesaid, under and by virtue of a certain indenture of lease, bearing date the 12th day of May, 1846, made between J. P. of the one part, and the defendant of the other part; by which indenture the said messuage and premises, with the appurtenances, were, for the consideration therein mentioned, leased, &c., unto the defendant, for the said term of fourteen years, at the yearly rent of 37*l.*,

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payable quarterly: that in the said lease there were and are contained covenants, on the part of the defendant, for himself, his executors, &c., to pay the rent &c.: that the defendant, at the time of the making of the said agreement, represented to the
[*46] plaintiff that he the defendant was, and the plaintiff *avers that he the defendant in fact then was, lawfully possessed of certain fixtures then annexed to the said messuage and premises, and then also was lawfully entitled to disannex and remove the same fixtures from the said messuage and premises, and convert and dispose thereof to his, the defendant's, own use, but did not represent to the plaintiff what the said fixtures were, nor did, nor does the plaintiff know what they were: that thereupon theretofore, to wit, on the 16th February, 1847, by a certain agreement then made by and between the plaintiff and defendant, of and concerning the said messuage and premises, with the appurtenances, and of and concerning the said residue of the said term, and of and concerning the said fixtures, and of and concerning the plaintiff, and of and concerning the defendant, it was agreed by and between the plaintiff and defendant as follows, that is to say: "Memorandum: Mr. Bailey, (meaning the defendant), of 23, East Place, &c., (meaning the said messuage and premises), has this day agreed to sell, and J. Manning (meaning the plaintiff) has agreed to purchase, the unexpired term or lease (meaning the said residue of the said term) of the house No. 23, (meaning the said messuage and premises), with the appurtenances, as above, and also the fixtures, &c., (meaning the said fixtures) belonging to the said C. Bailey, (meaning the defendant), to pay the rent, and all rates and taxes, due to the 25th of March next; and do also agree (meaning the defendant agreed) to give up possession of the said house and premises, (meaning the said messuage and premises), with the appurtenances and fixtures, (meaning the said fixtures), on or before the 12th of March next. The said J. Manning (meaning the plaintiff) has this day paid the sum of 10*l.* as a deposit, and agrees to pay the remainder on taking possession of the said premises (meaning &c.) and the said fixtures (meaning &c.) Witness our hands" &c. The declaration then contained an averment, that the plaintiff paid the 10*l.* to the
[*47] defendant, &c.; it also contained an averment *of mutual promises; and then proceeded to state, that although the said 12th day of March, 1847, had expired before the commencement of the suit, and although the plaintiff, on that day, was ready and willing and offered to the defendant to purchase the said residue of the said

term and the said fixtures of and from the defendant, at the price of 40*l.*, according to the terms of the said agreement, and to accept possession of the said messuage and premises, with the appurtenances and fixtures, and to pay the defendant the sum of 30*l.*, being the difference between the said sum of 10*l.*, so paid as aforesaid, and the said sum of 40*l.*, and then tendered to him, the defendant, to execute a certain parchment writing sufficient, when signed and sealed by the defendant, and delivered by the defendant as his act and deed, to assign to the plaintiff the residue of the said term, which said writing then was in the words, letters, and figures following, that is to say, "This indenture, made the 12th day of March, 1847, between Charles Bailey, of &c., of the one part, and Joseph Manning, of &c., of the other part, which, after reciting that by a certain indenture made by and between Charles Bailey and one J. P., all that the messuage or tenements and hereditaments therein and hereinafter particularly described, with the appurtenances, were, for the considerations therein mentioned, demised, leased, set, and to farm let unto the said Charles Bailey, for the term of fourteen years thence next ensuing, and fully to be complete and ended, on payment yearly and every year, during the said term thereby demised, unto the said J. P., his executors, administrators, or assigns, of the rent or sum of 37*l.* of lawful money, free and clear of and from the land-tax, and all other taxes, rates, charges, assessments, and deductions whatsoever, the said rent to be payable quarterly, namely, on &c.; and in the said lease are contained covenants, on the part of the said Charles Bailey, for himself, &c., for the payment of the rent, land-tax, &c. And also that the said Joseph Manning has lately contracted with the said Charles Bailey *for the sale to him of the residue of the said [*48]
term of fourteen years, so granted to the said Charles Bailey by the said J. P., in the said messuage or tenements and hereditaments therein and hereinafter described and assigned, or intended so to be, with their appurtenances, and also all and singular the fixtures belonging to the said messuage or tenement and hereditaments, at or for the price or sum of 40*l.*: Now this indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the sum of 40*l.*, of lawful British money, to him the said Charles Bailey in hand well and truly paid by the said Joseph Manning, at or immediately before the sealing and delivering of these presents, the receipt whereof, and that the same is in full for the purchase of the residue now to come and unexpired of the said

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term of fourteen years in the said messuage or tenements and hereditaments hereinafter described, and hereby assigned, or intended so to be, he the said Charles Bailey doth hereby confess and acknowledge, and of and from the same and every part thereof doth fully and absolutely acquit, release, and discharge the said Joseph Manning, his executors, &c., he, the said Charles Bailey, hath assigned, transferred, and set over, and by these presents doth assign, transfer, and set over, unto the said Joseph Manning, his executors, &c., all that messuage or tenement, being, &c., and their appurtenances; and also all and singular the fixtures belonging to the said messuage or tenement, &c., and hereditaments hereinbefore described and intended to be hereby assigned, and also the hereinbefore recited indenture of lease of the 12th day of May, 1846: To have and to hold the said messuage or tenement, and all and singular the said premises hereby assigned or intended so to be, with their appurtenances, unto the said Joseph Manning, his executors, &c., for and during all the residue and remainder now to come and unexpired of and in the term of fourteen years, so granted by the said hereinbefore recited indenture of lease of the 12th of May, 1846," &c. (The instrument contained several [*49] covenants *which are not material to the present question.) The declaration then stated, that the plaintiff did then request the defendant to accept the said sum of 30*l.* so tendered, and to execute the last-mentioned writing, to wit, by signing the same, and sealing the same, and delivering the same as his, the defendant's, act and deed, and to give up possession to the plaintiff of the said messuage and premises, with the appurtenances and fixtures, yet the defendant disregarded his said promise, and did not nor would, on or before the said 12th day of March, or at any other time, give the plaintiff possession of the said messuage and premises, and fixtures, or any or either of them, or sell or assign to the said plaintiff the said residue of the said term, &c. To this declaration the defendant pleaded several traverses, upon each of which issue was joined.

At the trial, before Parke, B., at the Middlesex sittings in Trinity Term last, the plaintiff had a verdict, with 30*l.* damages.

Montagu Chambers, in the same Term, obtained a rule calling on the plaintiff to show cause why the judgment should not be arrested.

Watson now showed cause:

The objection which has been raised to this declaration is, that, inasmuch as the defendant agreed to sell his own fixtures only, he

was not bound to execute the instrument tendered to him for execution, as it would have passed all the fixtures, whether belonging to him or not. The defendant was called upon to assign the term merely, and the fixtures for the term. This *habendum* would pass the term and the fixtures belonging to the buildings. All that the plaintiff required was a sufficient assignment of the term. He referred to *Colegrave* v. *Dias Santos* (1).

Chambers, in support of the rule:

The judgment ought *to be arrested. The recital is incorrect. [*50] It distinctly states an agreement to assign the defendant's term in the premises, and also a sale of all the fixtures, not only the fixtures to which the defendant was entitled; so that by this deed, if it had been executed, not only landlords' or tenants' fixtures, but the fixtures belonging to a previous tenant, would pass. The defendant has only agreed to transfer his own. The *habendum* excludes the fixtures, and only goes to the term.

PARKE, B.:

I am of opinion that this rule ought to be made absolute. In the case of *Vonhollen* v. *Knowles* (2), where there was an agreement that the plaintiff should purchase of the defendant a certain house and shop-fixtures for 150*l.*, whereof 125*l.* was to be paid upon taking possession, and the remainder by bills at certain dates, and that the defendant should grant, and the plaintiff should take, a lease of the messuage for twenty-one years, at the rent of 60*l.*, the plaintiff tendered an instrument to the defendant for his execution, which stated that, as well in consideration of the sum of 150*l.* paid by the plaintiff to the defendant, as also of the yearly rent, covenants, &c., the defendant had demised and leased all that messuage, &c.: and this Court held that it was not such an instrument as the defendant had bound himself by his agreement to execute. My brother ALDERSON there said, "Although the objection taken by the defendant is one that deserves but little favour, it seems to me that it must necessarily prevail. The plaintiff being bound to tender a lease in conformity with a certain agreement, has tendered one, which states that the sum of 150*l.*, which by the agreement was to be paid for fixtures, was to be paid as a consideration for the leas itself. Now, supposing this recital not to operate as an estoppel upon the defendant, in case *an action was brought against him by the [*51]

(1) 2 B. & C. 76 (2) 12 M. & W. 602.

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present plaintiff, still it would place him in a different situation from that in which he now stands, as it would afford *primâ facie* evidence against him, which he would have to rebut by means of witnesses, or by the production of the agreement; the lease would therefore be evidence against him, although, perhaps, not conclusive." Now here, this recital, which states that the defendant had lately contracted with the plaintiff for the sale to him of all and singular the fixtures belonging to the said messuage or tenement and hereditaments for the price of 40*l.*, and the receipt of that sum, is not correct. If the defendant had executed this instrument, it would have been strong evidence against him. As this is upon the record, we can say that it is not such an instrument as the defendant was, in conformity with his agreement, bound to execute. It is certainly an unfortunate recital; but if the defendant had executed the lease, he would have placed himself in a worse situation than that in which he is at present.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule absolute.

1848. *Feb.* 12.

[93]

LOCKETT AND ANOTHER *v.* NICKLIN.

(2 EX. 93—101.)

The defendant ordered goods by letter, which did not mention any time for payment. The plaintiff sent the goods and an invoice: Held, that parol evidence was admissible to show that the goods were supplied on credit, the letter not being a valid contract within the Statute of Frauds (1).

DEBT for goods sold and delivered. Plea, *nunquam indebitatus.*

At the trial, before Patteson, J., at the Summer Assizes for Suffolk, 1847, it appeared from the plaintiffs' evidence that they were patent grease manufacturers at Norwich, and that on the 24th December, 1846, the defendant, who was an ironmonger at Wolverhampton, sent to them the following order:

"WOLVERHAMPTON, STAFFORDSHIRE,
Dec. 24, 1846.

"Messrs. LOCKETT & Co.

"For T. B. Nicklin & Co., two casks railway grease, stiff, marked (488) on each cask, about 10 or 12 cwt. each, 10*s.*; one cask 10 cwt., marked (H.).

"Let these be sent to Mr. Ebbern & Co., 7, Paddington Wharf.

(1) See now sect. 4 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71). —J. G. P.

London, to our order; invoice, per post, early as possible, and if approved, as I told Mr. Lockett, will give you further orders. Let no other mark be on the casks, but the above in red paint. LOCKETT v. NICKLIN.

"Send us a full priced list of all goods you get up on sale."

The goods were accordingly forwarded to the defendant, and the following invoice sent by post:

"NORWICH, Dec. 28, 1846. [94]

"Messrs. NICKLIN & Co.,

"Bought of W. Lockett & Co.,
Patent Grease Makers, Foundry Wharf, Norwich,
And Tanner's Lane, Ipswich.

"Bt.

2 Pun. Pat. Railway Grease,								
Marked, N. (488) 1	...	16	2	0	—	1	2	24
N. (488) 2	...	16	1	23	—	1	2	24
1 Marked N. (H.)		14	0	0	—	1	2	0
		46	3	23		4	3	20
Fare	...	4	3	20				
		42	0	3 *a* 10*s*.				
						£21	0	4

"Carriage paid to London.

"To be left at W. Ebbern & Co.'s, 7, Paddington Wharf."

Similar orders were given by the defendant on the 30th December, 1846, and 21st January, 1847, and goods were accordingly forwarded and invoices sent. On the part of the defendant, parol evidence was tendered to prove that the terms on which the defendant gave the orders were six months' credit, and a bill at three months. This evidence was objected to, as varying the written contract. The learned Judge ruled that the evidence was admissible, not for the purpose of varying the contract, but of supplying the omission in the written document as to the time of payment; and a verdict was found for the defendant, leave being reserved for the plaintiffs to move to enter a verdict for them.

A rule *nisi* having been obtained accordingly,

Fitzpatrick (*Byles*, Serjt., with him) showed cause:

Parol evidence was admissible for the purpose of proving *that the time of credit had not expired. The reason assigned by Lord Coke against admitting parol evidence to contradict the terms of a deed is, that "it would be inconvenient that matters in writing, made [*95]

LOCKETT v. NICKLIN.

on consideration, and which finally import the certain truth of the agreement of the parties, should be proved by the uncertain testimony of slippery memory:" *Countess of Rutland's* case (1); 2 Phil. Ev. 357. Here the letters and conversation taken together formed the contract.

(ALDERSON, B.: Suppose a person wrote to another proposing to deal with him on six months' credit, and the latter by parol accepted the offer, and then the former wrote another letter simply ordering goods; it would be a question for the jury to say whether the order for the goods was not an order upon the previous terms.)

The principle of the decision in *Eden* v. *Blake* (2) is applicable to this case. That was an action to recover 6*l*. 9*s*. 10*d*., the price of a dressing-case sold by auction. In the printed catalogue the dressing-case was described as having silver fittings; but, previously to the sale of it, the auctioneer stated publicly from his box, and in the hearing of the defendant, that the catalogue was incorrect in stating the fittings of the dressing-case to be of silver, and that it would be sold as having plated fittings, but no alteration was made in the catalogue. Under these circumstances, it was held that parol evidence of the statement of the auctioneer was admissible, since the contract existed partly in the printed particulars and partly in the parol statement of the auctioneer.

(PARKE, B.: You say there would have been no contract within the Statute of Frauds unless there had been an acceptance of part of the goods, and that the plaintiffs could not have succeeded in an action for not receiving the goods, as the letter was not meant to be a memorandum of the agreement, but only an order for the goods.)

[*96] Even assuming the contract to be *contained in the letter, it would still be necessary to give parol evidence to explain it, for there is no statement of the time when the price is to be paid. If it be said that the law will imply payment within a reasonable time, parol evidence must nevertheless be given, in order to show what is a reasonable time, with reference to the custom of the trade, or price of the goods. The judgment of PARKE, B., in *Hutton* v. *Warren* (3), shows the principle on which extrinsic evidence is admissible to annex incidents to written contracts, namely, a presumption that

(1) 5 Co. Rep. 26.
(2) 67 R. R. 757 (13 M. & W. 614).
(3) 46 R. R. 368 (1 M. & W. 466).

the parties did not mean to express in writing the whole of the contract by which they intended to be bound. * * In *Ellis* v. *Thompson* (1), which was an action for not accepting goods, to which the defendant pleaded that the plaintiff was not ready to deliver them within a reasonable time, it was held that the parol representation of the broker, at the time of sale, that the goods were ready for shipment, was admissible in evidence. Lord ABINGER says, "Suppose a man contracts to sell certain goods, and the parties agree that the goods shall be *conveyed to London, and [*97] nothing be said about the time of delivery, would it not be essential to ascertain what the parties were contracting about, and whether anything was said at the time, and whether the reasonable time not being shown by the contract itself, you could derive it from other sources?"

(ALDERSON, B.: There the evidence was given merely for the purpose of showing what the words "reasonable time" meant.)

O'Malley and *Couch*, in support of the rule:

The order and acceptance in writing of the goods constituted a complete contract, which could not be varied by parol evidence.

(ALDERSON, B.: An acceptance in writing is different from an acceptance by parol; the act of receiving the goods may be consistent with an agreement which contained qualified terms.)

The invoice, which was sent according to order, amounts to an acceptance in writing.

(ALDERSON, B.: Suppose a person offers to sell goods to another upon certain terms, and the latter does not then agree, but afterwards writes, merely directing the goods to be sent, without mentioning any terms; must not the contract be considered as made upon the terms offered? Or suppose, in this case, instead of the previous statement deposed to by the witnesses, the plaintiff had written to the defendant, offering to sell him goods on the following terms, namely, six months' credit and three months' bill, and that after the expiration of the three months, the defendant had sent a letter to the plaintiff, desiring him to send other goods, without mentioning any terms, and the plaintiff had then sent the invoice; would not the two letters constitute the contract? and if so, where is the difference between the plaintiff writing and speaking the terms?)

(1) 49 R. R. 679 (3 M. & W. 445).

LOCKETT v. NICKLIN.

Unless there is something on the face of the writing which leads to the inference that the parties contracted with reference to some previous terms, parol evidence must be altogether rejected.

(PARKE, B.: Where the parties agree that a particular instrument
[*98] shall *contain the terms of the contract, the rule clearly is, that parol evidence cannot be given to add to or diminish from those terms, though it may to annex incidents, such as the custom of trade, &c. Here, however, the letter of the 24th of December refers to some previous conversation with the plaintiff.)

The letter plainly indicates that payment is to be made on delivery. *Ford* v. *Yates* (1) is a conclusive authority to that effect.

(PARKE, B.: That case is based upon the supposition that there was a memorandum entered into by the broker contracting for both parties, but it was not so.

(ALDERSON, B.: In that case there could have been no contract, for the memorandum only contained the name of the defendant's agent.)

That decision proceeded on the ground that the legal construction of the memorandum was, that the goods were to be paid for on delivery. * * *

[99] PARKE, B.:

The rule must be discharged. In deciding this particular case on the circumstances of the case itself, I think parol evidence was admissible to prove the previous conversation with the plaintiff. In order to render the defendant liable, there must be some evidence to take the case out of the Statute of Frauds. That liability arises from his receipt and acceptance of the goods; and if the plaintiff relied on that, the defendant would have been at liberty to show upon what terms he accepted them, by going into evidence of the conversation which took place at the time the order was given, by which it appears that the contract was to pay at six months' credit, and by a bill at three months. But the plaintiff, instead of having recourse to the receipt and acceptance of the goods, puts in the original order, which, without further explanation by parol, would be an order for payment on delivery. If, then, the plaintiff, instead of giving further evidence to explain this order,

(1) 58 R. R. 471 (2 Man. & G. 549; 2 Scott, N. R. 645).

says that the defendant, by accepting the invoice, which treats him as a purchaser, has had ample notice, and therefore there is an acceptance of the terms of the sale, it is competent for the defendant to show that he received the goods on the understanding that he bought them by credit at six months, and bill at three months. The case of *Ford* v. *Yates* was disposed of on the supposition, which turned out to be erroneous, that the memorandum entered into by the broker was a binding memorandum under the Statute *of Frauds. [*100] It was signed with the intention of being a memorandum of the contract of purchase and sale, and the Court began by treating it as a binding contract; and, on that supposition, I am by no means prepared to say that decision is wrong.

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ALDERSON, B.:

I am of the same opinion. In *Ford* v. *Yates*, the decision of the COURT proceeded on the supposition that the written instrument complied with the terms of the Statute of Frauds. Under that statute, a contract to deliver goods, without mentioning a time for payment, means that the delivery and the payment shall be contemporaneous acts; and *Ford* v. *Yates* decided that in such case evidence was inadmissible to show that it was not intended that the payment should be contemporaneous with the delivery of the goods. Here the difficulty is of a different nature. The documents in question are not a contract, but are writings out of which, with other things, a contract is to be made. The question, then, is, whether the defendant has not a right to adduce evidence, not to contradict the written instruments, but to show the real contract, of which the paper contains only one of the terms. In order to do that, the defendant must resort to the previous conversation. It is like the case of an offer by letter, written by the plaintiff to the defendant, stating the terms on which the former proposes to sell certain goods; in answer to which the defendant writes a letter to the plaintiff, desiring him to send certain articles, but not specifying any terms. In such case, can it be doubted that the second letter would have reference to the terms contained in the first, and that the two letters would constitute the contract; and that when the plaintiff sent the goods, he would send them on the terms contained in his own letter? Here, instead of a previous letter written by the plaintiff, there is a conversation between him and the defendant. In holding this evidence admissible, we do not trench on any of the cases.

LOCKETT v. NICKLIN. [101]

PLATT, B.:

If the invoice had been signed by the defendant, there might have been some colour for the argument on behalf of the plaintiff, for then it might have been urged that, as the contract made no mention of the time of payment, it would be inferred that payment was to be made either on request or within a reasonable time after the bargain. The fallacy of the argument on the part of the plaintiff consists in treating the writings as a contract, when, in fact, they are merely acts done in pursuance of a contract. The letter of the 24th of December refers to some conversation, and unless that conversation be imported by way of evidence, it cannot be known when the payment was to be made, the documents being silent as to the time.

Rule discharged.

1848. *Feb.* 9.

[101]

MORLEY *v.* PINCOMBE.

(2 Ex. 101—102; S. C. 18 L. J. Ex. 272.)

Commodities which cannot be restored upon a replevin in the same plight and condition as that in which they were when taken, are not distrainable for rent at common law; and therefore the flesh of animals lately slaughtered cannot be distrained.

TRESPASS, for breaking and entering the plaintiff's close, and taking twenty dead pigs, twenty cwt. of pork, and divers other articles. Pleas: first, Not guilty "by statute;" and, secondly, leave and license.

At the trial, before Wilde, Ch. J., at the last Devon Summer Assizes, it appeared that the articles in question were seized by the defendant as a distress for rent. The defendant, under the direction of the learned Judge, had a verdict.

Crowder obtained a rule *nisi* for a new trial, on the ground of the verdict being against evidence, and also for misdirection.

Kinglake and *Fitzherbert* now showed cause, and contended [*102] *that the evidence was in the defendant's favour.

(PARKE, B.: Assuming the first question to be decided in the defendant's favour, the remaining point must be found for the plaintiff; for how can commodities of a perishable nature, and which cannot be restored in the same state as that in which they were taken, be made the subject of distress? The common law is not taken away by the statute of 2 W. & M. c. 5.

ROLFE, B.: The rule is plain, you cannot distrain commodities which are liable to perish within a reasonable time after they have been taken.

PARKE, B.: It was said by Lord Chief Justice WILLES, in *Simpson* v. *Hartop* (1), that "cocks and sheaves of corn were not distrainable before the statute 2 W. & M. c. 5, (which was made in favour of landlords), because they could not be restored again in the same plight and condition that they were before upon a replevin, but must necessarily be damaged by being removed."

ALDERSON, B., referred to 1 Roll. Abr. 666. The rule is plain: what is true of corn, is true of the flesh of pigs.)

Crowder and *Montagu Smith*, in support of the rule, were not called upon.

Per CURIAM (2):

Rule absolute.

LLOYD *v.* DAVIES.

1848. *Feb.* 11.

(2 Ex. 103—104; S. C. 18 L. J. Ex. 80.)

[103]

A tenant by *elegit* has a right to distrain without attornment.

THE first count of the declaration in case was for an excessive distress; the second count was in trover. Plea, Not guilty "by statute."

At the trial, before Cresswell, J., at the last Cardigan Summer Assizes, the plaintiff, in order to show his right to distrain, put in an *elegit*, but did not prove that the defendant had attorned to him. It was thereupon contended that the defendant had no right to distrain without attornment, and of that opinion was the learned Judge, and the plaintiff had a verdict.

Lush, in Michaelmas Term last, moved for a rule calling on the plaintiff to show cause why there should not be a new trial on the ground of misdirection:

There was no need of attornment. In *Rogers* v. *Pitcher* (3), GIBBS, Ch. J., says: "If the land had been in the possession of the former owner, the sheriff might have delivered actual possession: where it is in the possession of a tenant, the sheriff sets it

(1) Willes, 515.
(2) PARKE, B., ALDERSON, B., ROLFE, B., and PLATT, B.
(3) 6 Taunt. 207. See 25 R. R. 582, 586.

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out by metes and bounds, and the tenant is bound thenceforth to pay rent for his moiety to the tenant by *elegit*. This is a case in which attornment was not necessary before the Statute of Attornments, because tenant by *elegit* was in by judgment of law, to whom attornment was not necessary." In Perkins (1) it is said: "But in cases of grants of reversions, there ought to be attornments; otherwise they shall not pass, if the grant be not by matter of record," &c. The statute of 4 Anne, c. 16, only applies to the acts of the parties. (He also referred to Co. Litt. ss. 584, 585.)

The COURT granted a rule *nisi*; against which

[104] *Evans* (*Bramwell* with him) now showed cause:

The defendant had no right to distrain without attornment. *Harris* v. *Booker* (2) is not a decision upon the point; but BEST, Ch. J., there says, in delivering the judgment of the COURT, "We do not agree that an attornment would have been unnecessary, supposing the plaintiff had been in a situation to call for it. . . . In the present cause the property is claimed under a judgment; and even if the tenant by *elegit* had a right to enter, we think he could not have proceeded for rent without an attornment."

(PARKE, B.: There are three authorities in the Year Books against you, cited in Roll. Abr., tit. "Attornment," (F), 37 Hen. VI. 33; 39 Hen. VI. 24; 20 Hen. VI. 7 b. They settle this point, and decide that attornment is not necessary; where the reversion was assigned by operation of law it was not requisite, but it was when assigned by the act of the parties. If a party gets the reversion, he is entitled to the rent which is attached to it.

ROLFE, B., referred to Roll. Abr., tit. "Execution (B)": *Sir Thomas Cambell's* case (3).

PARKE, B.: There is also *The Bishop of Bristol's* case (4). The question is clear upon the authorities.)

Watson, contrà, was not called upon.

Per CURIAM (5):

The rule must be

Absolute.

(1) Sect. 114.
(2) 4 Bing. 96; 12 Moore, 233.
(3) *tit.* "Execution—A quel temps relatera pur chattels." B. 5, p. 894.
—J. G. P.
(4) 3 Leon. 113.
(5) PARKE, B., ALDERSON, B., ROLFE, B., and PLATT, B.

YOUNG AND ANOTHER *v.* HOPE AND ANOTHER.

1848.
Feb. 10.

(2 Ex. 105—110.)

[105]

A trader took possession of goods under an agreement with the owner that he should keep possession for a twelvemonth, on payment of a certain sum, but if the money was not paid on a certain day, the owner should be at liberty to retake them. The goods continued in the possession of the trader until the stipulated time for payment, when the money not having been paid, the owner sold them, after an act of bankruptcy committed by the trader, but before the *fiat* issued: Held, that this was a "transaction" protected by the 2 & 3 Vict. c. 29, s. 1 (1).

TROVER, by the assignees of a bankrupt, for certain goods, chattels, and effects. The declaration contained a count on the possession of the bankrupt, and another on the possession of the assignees. Pleas, Not guilty and not possessed.

At the trial, before the Lord Chief Baron, at the York Summer Assizes, 1847, it appeared that the goods in question, which consisted of shop fixtures and materials of trade, belonged to the defendant, and that one Nortlett came into possession of them under an agreement that he should keep possession for a twelvemonth, upon payment of a certain sum, but if he failed to pay the money on the 16th May, 1847, the defendant should be at liberty to retake the goods. Nortlett continued in possession of the goods, treating them as his own, until the 16th May, 1847, when the money not having been paid, the defendant, on the following day, sold them. On the 24th May, a *fiat* issued against Nortlett, on an act of bankruptcy committed on the 14th of May. It was submitted that the plaintiffs were entitled to recover, inasmuch as the goods were in the "order and disposition" of the bankrupt, within the 72nd section of the 6 Geo. IV. c. 16. On the part of the defendant, it was contended, that this was a "transaction" protected by the 2 & 3 Vict. c. 29, s. 1. The learned Judge was of opinion, that the agreement was a fraud on the creditors, and directed a verdict for the plaintiffs, reserving leave for the defendant to move to enter a verdict for him.

A rule *nisi* having been obtained accordingly,

H. Hill showed cause:

The question is, whether the 72nd section of the 6 Geo. IV. c. 16, relating to goods in the *order and disposition of bankrupts, is [*106]

(1) Quoted in the argument of *H. Hill*, *post*, p. 512. The words in the corresponding section of the Bankruptcy Act, 1883, are "any contract, dealing or transaction by or with the bankrupt for valuable consideration" (46 & 47 Vict. c. 52, s. 49).—J. G. P.

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affected by the 2 & 3 Vict. c. 29, s. 1. The latter statute enacts, "that all contracts, dealings, and transactions, by and with any bankrupt, really and *bonâ fide* entered into before the date and issuing of the *fiat*, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed." It will be argued on the other side, that the effect of that enactment is, to do away with the relation to the act of bankruptcy, and to substitute the issuing of the *fiat* for the act of bankruptcy, in all cases in which the party had not notice of the act of bankruptcy. Such construction, however, cannot be supported. The case of *Faucett* v. *Fearne* (1) shows that the words in the 6 Geo. IV. c. 16, s. 72, "at the time he becomes bankrupt," mean, at the time of the committing of the act of bankruptcy, and not the time when the *fiat* issued, the statute of Victoria having made no alteration in this respect. In *Load* v. *Green* (2), PARKE, B., in delivering judgment, says: "To come within the 72nd section of the 6 Geo. IV. c. 16, the goods must have been in the bankrupt's possession "at the time he became bankrupt; that is, at the time of the act of bankruptcy."

(PARKE, B.: No doubt that section must be construed so as to give the assignees all the property of which the bankrupt was the apparent owner at the time of the act of bankruptcy; but prior to the statute of Victoria, if the real owner had retaken possession of his goods before the act of bankruptcy, he would have been entitled to them in law. The question then is, whether the statute of Victoria does not give the same right, if he retakes them before the issuing of the *fiat*.)

The object of that statute was, to protect parties having *bonâ fide* dealings with the bankrupt, touching his property, or concerning payments made by or to him; but the statute was not intended to aid persons who intrusted their goods to a trader, in order to
[*107] enable him to obtain a false credit. The *true meaning of the statute appears from the preamble, which recites the 82nd section of the 6 Geo. IV. c. 16, relating to payments made by and to bankrupts without notice; but it makes no mention of the 81st section, relating to conveyances, contracts, and other dealings and transactions by and with bankrupts.

(PARKE, B.: It was clearly meant to alter the 81st section; and the omission to mention it shows how imperfect the recital is.)

(1) 66 R. R. 258 (6 Q. B. 20). (2) 71 R. R. 627 (15 M. & W. 216).

[He cited *In re Styan* (1) and *Wright* v. *Fearnley* (2).]

(PARKE, B.: All that the Court there decided, was, that a pledge of goods was not a payment within that section. In the case of *Pariente* v. *Pennell* (3), TINDAL, Ch. J., ruled, that goods suffered by the true owner to remain in the possession of a *trader till after a secret act of bankruptcy, but taken possession of before the *fiat*, do not, since the statute of Victoria, pass to the assignees.) [*108]

In that case the jury found that the plaintiff had notice of an act of bankruptcy, and a verdict was given for the assignees, so that there was no opportunity of questioning the ruling of the learned Judge.

Knowles appeared to argue in support of the rule, but was not called upon.

PARKE, B.:

The rule must be absolute. The question depends upon the true construction of the statute 2 & 3 Vict. c. 29, s. 1. *Mr. Hill* says, that it must be confined to cases in which the bankrupt transfers the right of property in his own goods. I cannot collect, from any expression in the preamble of the statute, that such construction is to be put upon it. After reciting the 6 Geo. IV. c. 16, and the 2 Vict. c. 11, it thus proceeds: "whereas it is expedient that further protection should be given to persons dealing with bankrupts before the issuing of any *fiat* against them." The object of the enactment was, to do away with the rule of relation to the act of bankruptcy, which was considered to work great injustice; and I see no reason why, if it were intended to prevent such rule of relation in the transfer of the bankrupt's property, it should not also apply to the case of a bankrupt dealing with the property of others. If the contract had been, that, for an antecedent consideration, the bankrupt would, on the 16th of March, deliver up certain property of him the bankrupt, and if he failed to do so, the party should be at liberty to take possession of the property; and if afterwards, in pursuance of that agreement, the party took possession, I cannot understand why that transaction should be protected, and the transaction of a bankrupt returning another person's goods should not also be protected. In the

(1) 1 Ph. 105.
(2) 5 Bing. N. C. 89; 6 Bing. N. C. 446.
(3) 2 Moo. & Rob. 516.

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absence of authority, I should have thought that the latter case would clearly fall within the description of a *"transaction by and with the bankrupt," before the date and issuing of the *fiat*. There are, however, two authorities, one of which, a decision of Lord Chancellor LYNDHURST, *In the Matter of Styan*, seems to me expressly in point. There a policy of insurance had been deposited as security for a debt; but the creditor omitted to give notice to the Insurance Company, before the commission of an act of bankruptcy by the depositor, the effect of which was, to leave the policy in the situation of goods in the apparent ownership of the bankrupt: but the creditor having given notice before the issuing of the *fiat*, and having no knowledge that an act of bankruptcy had been committed, the LORD CHANCELLOR thought the transaction protected by the 2 & 3 Vict. c. 29. Besides that case, there is the opinion of TINDAL, Ch. J., in the case of *Pariente* v. *Pennell* (1). It is true that an opinion expressed at Nisi Prius is not entitled to the same weight as if expressed after solemn argument, but the opinion is one which does not require authority to support it. Upon the true construction of the Act, and according to strict justice, this transaction ought to be protected.

ALDERSON, B.:

I am of the same opinion. This is a "transaction" which takes place between the time of the committing of the act of bankruptcy, and the issuing of the *fiat*. The Act of Parliament makes valid all such transactions, provided the party dealing with the bankrupt had no notice at the time of an act of bankruptcy. As to those matters, the act of bankruptcy and the issuing of the *fiat* are to be taken as one and the same day. In the case of *Faucett* v. *Fearne* (2), the goods came into the possession of the bankrupt for the first time after the act of bankruptcy and before the *fiat*; and it was argued that the case was not within the clause of the statute which makes goods in the possession of the bankrupt as reputed owner *"at the time he becomes bankrupt" subject to the disposition of his assignees. That case is relied upon as an authority to show that the 6 Geo. IV. c. 16, s. 72, is not altered by the 2 & 3 Vict. c. 29, s. 1; but the answer is, that the latter statute has no relation to such matters, inasmuch as it only renders valid particular transactions before invalidated by the rule of relation to the act of bankruptcy. In truth the present point was not decided

[*110]

(1) 2 Moo. & Rob. 516. (2) 66 R. R. 258 (6 Q. B. 20).

in that case. Here the goods were in the order and disposition of the bankrupt at the time of the committing of the act of bankruptcy; and if the true owner had not retaken possession of them, might have been disposed of by the assignees.

ROLFE, B.:

I am of the same opinion. The expression in the statute is, "all contracts, dealings, and transactions by and with any bankrupt." Here the transaction is this—that, before the committing of the act of bankruptcy, certain goods are deposited with the bankrupt, upon terms enabling him to keep possession of them for a year upon payment of a certain sum; and enabling the owner to resume possession in case the money was not paid at the stipulated time. The owner takes possession after the act of bankruptcy, and before the issuing of the *fiat*. Such a case seems to me to come within the express terms of the Act of Parliament. Was it not a "dealing," was it not a "transaction" with the bankrupt? It was evidently so. Without authority I should have thought it a clear case, and I am not able to distinguish it from *In re Styan*.

PLATT, B.:

It is clearly a "dealing" or "transaction" with the bankrupt before the issuing of the *fiat*.

Rule absolute.

SYERS *v.* JONAS.

1848. *Feb.* 18.

(2 Ex. 111—117.)

[111]

In an action for the price of tobacco sold, evidence is admissible to show that by the established usage of the tobacco trade, all sales are by sample, although not so expressed in the bought and sold notes (1).

ASSUMPSIT for goods sold and delivered, and goods bargained and sold. Plea, *non assumpsit*.

At the trial, before Wightman, J., at the Liverpool Summer Assizes, 1847, it appeared that the action was brought to recover 222*l.* 1*s.* 2*d.*, being the price of five bales of La Guayra tobacco, sold by the plaintiff to the defendant under the following circumstances: The plaintiff was a general merchant at Liverpool, and engaged in the La Guayra trade; the defendants were cigar manufacturers in London. On the 19th of August, 1846, one Samuelson,

(1) See the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 55.—J. G. P.

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of Liverpool, a tobacco broker, who had occasionally been employed both by plaintiff and defendants in the sale of tobacco, forwarded to the defendants six samples of fifty-one bales of tobacco then in bond, and which the plaintiff was desirous of selling. Samuelson represented that the bulk was equal to the sample. Some correspondence afterwards took place between the defendants and Samuelson as to the quality and price of the tobacco; and on the 14th of September, Samuelson being in London, concluded the bargain with the defendants, when bought and sold notes agreeing with each other were delivered to the plaintiff and defendants. The following is the form of the sold note:

"Messrs. E. JONAS and BROTHERS, London.

"LIVERPOOL, September 14, 1846.

"I have this day sold you on account Mr. W. H. L. Syers, fifty-one bales tobacco ex *Lucretia*, La Guayra, at 11*d.* per lb. in bond: customary allowances: payment two and two months.

"EDWARD SAMUELSON."

The defendants' case was, first, that Samuelson was appointed with limited authority to buy by sample only, and that the defendants
[*112] were not bound by the contract: *secondly, that the bulk did not correspond with the sample; and evidence was tendered to show that by the universal usage of the trade, a sale of tobacco was understood to be by sample. The learned Judge offered to leave the first question to the jury, which was declined by the defendants' counsel; and as to the other point, he ruled that the evidence was inadmissible, inasmuch as it varied the written contract, which was contained in the bought and sold notes; and under his Lordship's direction a verdict was found for the plaintiff.

A rule *nisi* having been obtained to set aside the verdict, and for a new trial, on the ground of misdirection and the rejection of evidence,

Tomlinson showed cause (February 10):

As to the objection that the broker had no authority to buy otherwise than by sample, and consequently the defendant was not bound by the contract, it is a sufficient answer that the learned Judge offered to leave the question to the jury.

The only point then is, whether evidence was admissible of the general custom in the tobacco trade, that all sales were understood to be by sample, though not so mentioned in the

contract. It is submitted that no evidence can be given for the purpose of controlling or varying the specific contract entered into. [He cited *Meyer* v. *Everth* (1) and *Trueman* v. *Loder* (2).] This custom of trade, which amounts to an implied warranty, cannot be annexed to an absolute contract, so as to control its provisions. [113]

The COURT called on,

Watson (with whom was *Hoggins*) to support the rule:

The usage of trade sought to be proved does not annex any additional term to the contract, but only explains its meaning. It is no variance to say, that, according to the usage of trade, all contracts of this kind are subject to a condition, that the bulk shall correspond with the sample. The evidence of this usage is equally admissible as a custom for a way-going crop in the case of a lease. It adds no new term inconsistent with the contract. [They cited *Bayliffe* v. *Butterworth* (3) and *Hutton* v. *Warren* (4).] Evidence may be given to show the meaning of the term "a month" in commercial transactions, that term not meaning the same period in law. This mercantile instrument must be construed with reference to the usage of trade, which annexes this condition as incident to every contract for the sale of tobacco. *Trueman* v. *Loder* (2) was decided on the ground, that the defendant was sufficiently proved to be the vendor of the tallow, and that evidence of custom for the purpose of shifting his liability was inadmissible. [114]

(PARKE, B.: In *Parker* v. *Palmer* (5), the words "by sample" are said to mean a mere collateral engagement, on the part of the seller, that the commodity shall be of a particular quality. If they merely amount to a warranty, and not a condition of sale, there would be nothing inconsistent with the contract in admitting evidence of the usage.)

* * The authority given by the defendant to the broker was to enter into the contract according to the usage of trade; and, as the bulk did not correspond with the sample, the defendant was not [115]

(1) 15 R. R. 722 (4 Camp. 22).
(2) 52 R. R. 451 (11 Ad. & El. 589).
(3) 74 R. R. 702 (1 Ex. 425).
(4) 46 R. R. 368 (1 M. & W. 466).
(5) 23 R. R. 313 (4 B. & Ald. 387).

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bound to receive the goods: *Lorymer* v. *Smith* (1). The condition of sale not having been complied with, the property in the commodity did not pass to the defendant: *Laidler* v. *Burlinson* (2), *Clarke* v. *Spence* (3). To an action for not accepting the tobacco, it would have been a good defence that the bulk did not correspond with the sample.

[He also cited *Hodgson* v. *Davis* (4), *Dickinson* v. *Lelwall* (5), and *Whittaker* v. *Mason* (6).]

Cur. adv. vult.

The judgment of the COURT was now delivered by

PARKE, B.:

In this case a motion was made for a new trial, and a rule *nisi* having been granted, the argument *took place a few days ago. It was an action for tobacco sold and delivered, and goods bargained and sold, to which there was a plea of the general issue. It appeared on the trial, before my brother Wightman, that the contract for the purchase of the tobacco, which was in bond in Liverpool, was made through the medium of a broker at Liverpool, who, having authority from both parties, received and transmitted samples to the defendant; and, having made the contract, gave the usual bought note to the defendant, and sale note to the plaintiff. Both notes agreed. The contract was (his Lordship read the bought note). The tobacco was delivered to the carrier at Liverpool for the defendant, and carried to London and placed in bond. *Mr. Watson*, for the defendant, made two points: First, that the broker was appointed with limited authority to buy by sample only, and that the defendant was not bound by the contract.

[*116]

It appears, however, that the learned Judge offered to submit this part of the case to the jury upon the evidence, and the objection cannot now avail.

The other and more material point was this: He offered evidence of the universal usage, that on a sale of tobacco, it was understood to be by sample, though not mentioned to be so in the contract; and the question is, whether such evidence was admissible? There is no doubt that in mercantile transactions, and others of ordinary occurrence, evidence of established usage is admissible, not merely to explain the terms used, but to annex

(1) 1 B. & C. 1.
(2) 46 R. R. 717 (2 M. & W. 602).
(3) 43 R. R. 395 (4 Ad. & El. 448).
(4) 11 R. R. 789 (2 Camp. 530).
(5) 4 Camp. 279.
(6) 2 Bing. N. C. 359.

customary incidents. In the case of *Hutton* v. *Warren* (1), the law on this subject was laid down fully, and the limitations pointed out. Such usage is admissible when it is not expressly or impliedly excluded by the tenor of the written instrument. The question then is, whether by implication that usage is excluded in this case? For the purposes of the argument, it *must be assumed, that in [*117] the tobacco trade, whenever a sale of tobacco took place, and the bought note was silent on that subject, and when samples were delivered, it was the prevailing usage that the vendor was understood to agree that the bulk should correspond with them. This undoubtedly amounts to a parol warranty or agreement that the bulk should correspond with the sample. If the goods have not been delivered, or the property has not passed by the bargain, (a question depending upon the terms of the bargain for a specific chattel), this agreement authorises the purchaser to refuse to receive the article sold, or complete the bargain. If he does receive it, or the property does pass, he may sue on the agreement, or give it in evidence in mitigation of damages, according to the authority of *Street* v. *Blay* (2). Now, the offer in this case was to prove an usage annexing an additional term to the contract not inconsistent with it, unless, indeed, the term "customary allowances" excludes this additional term on the principle of "*expressio unius est exclusio alterius.*" But it seems to us that this expression was used for a different purpose, alluding probably to some compensation for trifling damages, and that it has not the effect of excluding evidence of an implied agreement of correspondence with the sample.

Rule absolute.

(1) 46 R. R. 368 (1 M. & W. 466). (2) 36 R. R. 626 (2 B. & Ad. 456).

1848.
Feb. 5.
April 23.

[118]

THE NEWRY AND ENNISKILLEN RAILWAY COMPANY *v.* EDMUNDS(1).

(2 Ex. 118—127; S. C. 17 L. J. Ex. 102; 12 Jur. 101.)

Under the Companies Clauses Consolidation Act (8 & 9 Vict. c. 16) a resolution by directors to make "a call" need not specify either the time or place for payment, but the directors must appoint a time and place, which must be notified to the shareholder by a notice allowing twenty-one days for payment.

A purchaser of scrip certificates for shares in a Railway Company is not liable for calls until his name is entered on the sealed register of shares.

Whether an original allottee would in such case be liable, *quære*.

DEBT under the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, s. 26, to recover the amount of two calls on fifty shares in the Newry and Enniskillen Railway Company.

The defendant pleaded never indebted, and also pleas denying that the defendant was the holder of the shares, and that the calls were made. Upon which issues were joined.

At the trial before Lord Denman, Ch. J., at the Surrey Spring Assizes, 1847, the following facts appeared: The Company was incorporated by the 8 & 9 Vict. c. cxxix., and the first general meeting was held on the 20th August, 1845. The defendant was not an original allottee of the shares in question, but had purchased in the market the scrip certificates, which in September, 1845, and before either of the calls were made, he sent to the Company, and claimed to be entered in their books as the proprietor of such shares. His name was, thereupon, entered on a draft register of shares, and a receipt for the scrip sent to his agent. From this draft "the alphabetical numerical and sealed register of the Company" was made up, and the corporate seal affixed to it on the 27th of February, 1846, at the second meeting of the directors, and after the making of the first of the calls for which this action was brought. On the 22nd of June, 1846, there was a meeting of the directors, at which it was resolved, that the second call be made, and "that one month's notice be given;" but the resolution contained no time or place for payment. On the 28th of June, the following notice was sent to the defendant, signed by the secretary of the Company:

"SIR,—The directors of the Newry and Enniskillen Railway
[*119] *Company having made a call of 2*l.* 10*s.* per share, payable on or before the 8th of August next, you are requested to pay the sum of

(1) Cited in *Portal* v. *Emmens* (1876) 1 C. P. Div. 201 (affirmed *ib.* 664), 214, 46 L. J. C. P. 179, and *Johnson* v. *Lyttle's Iron Agency* (1877) 5 Ch. D. 687, 691, 46 L. J. Ch. 786.—J. G. P.

125*l.*, being the amount payable, in respect of such call, of the shares held by you in this Company, to any of the undermentioned bankers," (then followed the names of several bankers). "The bankers have instructions to charge interest at the rate of 5*l.* per cent. per annum on all sums which shall be tendered after the said 8th day of August next."

On the part of the defendant, it was objected, that the Company could not recover the first call, since, at the time it was made, the defendant's name was not on the sealed register of shareholders; that the second call was insufficient, inasmuch as the resolution did not state the time and place of payment. The learned Judge directed a verdict for the plaintiff for the amount of the calls, reserving leave for the defendant to move to enter a verdict for him.

Bramwell moved, in Easter Term (April 23rd):

The second call was insufficient, and the notice was defective for want of a proper call; so that the two together are not a compliance with the requisites of the 8 & 9 Vict. c. 16. The 21st section of that statute enacts, "that the several persons who have subscribed any money towards the undertaking, or their legal representatives respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the Company, at such times and places as shall be appointed by the Company." The following section, after providing for twenty-one days' notice, enacts, "that every shareholder shall be liable to pay the amount of the calls so made in respect of the shares held by him, to the persons and at the times and places from time to time appointed by the Company." The expression "on the day appointed for payment" is also found in the 23rd section, which requires interest to be paid on "calls" unpaid. By the 25th section *"if, [*120] at the time appointed by the Company for the payment of any call, any shareholder shall fail to pay the amount of such call, it shall be lawful for the Company to sue such shareholder," &c. If the 22nd section had not contained any provision as to notice, it is evident that the resolution of a call must have appointed a time and place for payment. It will, perhaps, be said, that the provision as to twenty-one days' notice shows, that "a time appointed by the Company" must be the time appointed by that notice; for as the notice might be given after the day appointed by the resolution, and as the shareholder could not be sued until twenty-one days after notice, the time appointed for payment must be a time after

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twenty-one days' notice. That, however, is not the true construction; the meaning of the enactment is, that no action shall be brought unless notice be given.

(PARKE, B.: In a case of *The Great North of England Railway* v. *Biddulph* (1), this Court held that the resolution need not specify the place for payment.)

The object of the 23rd and 25th sections were not to give the Company a right of action, but to make the shareholder liable to interest, if he failed, after notice, to pay on the day appointed.

(PARKE, B.: Does the word "call" mean anything more than a call for money; and is not a call for money an application for money? If so, the Legislature says, that there shall be an application for money to each subscriber. Your argument is, not that the Company shall do it uniformly, but that it is a condition precedent that they shall.)

The 26th section uses the word "call" in a different sense, and as meaning the amount to be paid. When the call is made, a certain day must be appointed for payment; and before a shareholder can be sued, twenty-one days' notice must be given. The Act of Parliament becomes consistent if read in this way,—make a general call, give a time and place for payment, and also twenty-one *days' notice, and then you may maintain an action. If the twenty-one days' notice be given prior to the time appointed for payment by the resolution making the call, then you are entitled to interest.

[*121]

He then argued that the defendant was not liable to the first call, as his name was not on the sealed register at the time that call was made.

POLLOCK, C. B.:

The Court think you are entitled to a rule on that point. With respect to the other objection, it appears to me that there is no foundation for it.

PARKE, B.:

I am of the same opinion. It is clear that the word "call" is used in the Act in two different senses. In one part it means, the applications to the shareholders to pay; and in another, the amount to be paid. The sections which empower the Company to make

(1) 56 R. R. 699 (7 M. & W. 243).

calls contain no express direction that the same application shall be made to each individual for the same portion of the sum originally subscribed. Probably the directors may be under an objection to do so, but I am certainly of opinion that it is not a condition precedent to their right to recover the amount of the call. If it were so held, the affairs of these Companies would be in the greatest confusion; for suppose a notice by accident mislaid, the consequence would be, that the shareholder for whom it was intended would not be bound to pay his call, and those who had already paid on individual notices, and who might be supposed to have paid on the faith that the call was made on each equally, would have a right to claim from the directors the money they had paid, on the ground that it was paid under a mistake of the facts. That construction would be fraught with such evil consequences, that I think it impossible, (putting a reasonable interpretation on the Act of Parliament) to say that the Legislature intended that what they have not expressly declared, but which is only implied, should amount to a condition precedent. I *am therefore of opinion, that it is not [*122] a condition precedent that each party should have notice to pay the amount of his call at the same time and place. It follows that the resolution to make a call need not specify either the time or place for payment; but the directors must appoint a time and place, which must be notified to the shareholder by a notice, allowing him twenty-one days for the purpose of payment. The case of *The Great North of England Railway* v. *Biddulph* (1) proves, that the resolution need not contain the place of payment; and I think that by implication it also proves, that it need not contain the time of payment. The resolution is nothing more than a determination, that thereafter "a call" shall be made, that is, that an application shall be made to each shareholder for a proportion of his share; and it is enough if the directors appoint a time or place, either by public advertisement, (where such a mode is allowed by the private Act), as in the case referred to, or under the general Act, by an individual notice to each shareholder: consequently that objection cannot prevail.

PLATT, B., concurred.

Rule refused as to that point; granted on the other.

Shee, Serjt., *Petersdorff*, and *E. James* now showed cause:

The defendant was liable as a proprietor, although the register

(1) 56 R. R. 699 (7 M. & W. 243).

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upon which his name appears was not sealed. The case of *The Cheltenham and Great Western Union Railway Company* v. *Price* (1) will probably be relied upon by the other side. There the Act incorporating the Company (6 Will. IV. c. 77) enacted, that in an action for calls, the book of shares, under the seal of the Company, should be *primâ facie* evidence that a party was proprietor of shares.

[*123] It appeared that a call was made in October, 1836, and that *the book of shares, which contained the name of the defendant as a shareholder, was made up before the end of September, 1836, from claims sent in by different parties, but the seal was not affixed to it till November, 1836. Under those circumstances, Lord DENMAN ruled that this book was no evidence that the defendant was a proprietor of shares at the time of the call in October, 1836. Here, however, there is other evidence to show that the defendant was a shareholder, for he by letter declared himself the owner of fifty shares, and claimed to have his name entered on the register as such owner. The sealing of the register is not essential to constitute a shareholder, but is merely a mode of authenticating the draft register; and the fact of proprietorship may be proved by evidence *aliunde*. By the 6th section of the local Act, 8 & 9 Vict. c. cxxix., the Company are authorised "to make on the shareholders" calls to a certain limited amount; and the defendant was a "shareholder" within the meaning of that section. [They referred to sects. 8, 9, 18, 28, and 33 of the Companies Clauses Act, 1845, and continued:]

[125] A new proprietor has no means of compelling the Company to affix their seal to the register, and it would be hard if his privileges or liabilities depended on their so doing.

(PARKE, B.: The 8th section of the 8 & 9 Vict. c. 16, says, that "every person who shall have subscribed the prescribed sum, &c., or shall otherwise have become entitled to a share in the Company, and (not or) whose name shall have been entered on the register of shareholders, shall be deemed a shareholder.")

That is, in order to exercise the rights of a shareholder. The 27th section says, that in an action for calls, it shall be sufficient

[*126] to prove that the *defendant was a shareholder at the time the call was made; and the 28th section makes the production of the register *primâ facie* evidence of that fact. It is not open to the defendant to say that his name is not on the register, if the Company prove, in point of fact, that he is a shareholder. The

(1) 9 Car. & P. 55.

interpretation clause, section 3, declares that the word "shareholder" shall mean "shareholder, proprietor, or member of the Company," not a person whose name is on the register.

(PLATT, B.: The 8th section should be read as if the words "shareholder, proprietor, or member of the Company," were introduced into it.)

Montagu Chambers and *Bramwell* appeared to support the rule, but were not called upon.

PARKE, B.:

The rule must be absolute. These Companies appear perfectly satisfied as soon as they have obtained their Acts of Parliament, and never trouble themselves to look into the clauses and see what is required to be done by them. By the 8th section of the general Act, all persons who have subscribed to the Company, or have otherwise become entitled to share in it, are to be deemed shareholders, which the interpretation clause explains to mean "shareholders, proprietors, or members of the Company." Then, by the 9th section, the Company are required to enter in a book, to be called "The Register of Shareholders," the names of all persons entitled to shares, with the number of shares to which each is entitled, which book is to be authenticated by the seal of the Company. By the 28th section, this register is made *primâ facie* evidence of a party therein named being a shareholder; it is not, however, conclusive, for he may, notwithstanding, show that his name has been put there without his consent. By the 27th section, the Company, in actions for calls, must prove that the defendant was a shareholder in the undertaking at the time the call was made; that is, a shareholder, in the sense of the 8th and 9th sections. The result is, that there is no *register until after it is sealed; [*127] and no person who was not an original subscriber can be liable as a shareholder, unless his name is on a sealed register. Probably that is required both in the case of an original subscriber and a transferee of scrip. It is only necessary, in this case, to say that a transferee is not liable for calls until after his name is entered on a sealed register. That was not done here until after the first call was made; and the rule must, therefore, be absolute.

ALDERSON, B., and PLATT, B., concurred.

Rule absolute.

1848.
Jan. 20.
Feb. 18.

WHITWELL *v.* HARRISON.

(2 Ex. 127—136; S. C. 18 L. J. Ex. 465.)

[127]

A vessel was insured "at and from Liverpool to Quebec, during her stay there, and from thence back to her discharging port in the United Kingdom, and until she had moored at anchor twenty-four hours in good safety." The vessel was chartered to take on board a cargo of timber at Quebec, and to proceed therewith to Wallasey Pool, in the river Mersey, or as near thereto as she could safely get, and there discharge her cargo. The vessel sailed from Quebec on the 23rd July, 1845, and arrived in the Mersey on the 4th September, and anchored at the Bell Buoy. The next morning she was towed up by a steam-boat, and came abreast of Wallasey Pool; but, being unable to enter the pool by reason of her too great draft of water, the captain anchored and proceeded to Liverpool to report the vessel, and engaged lumpers to discharge the cargo at a fixed rate of payment, which was to include the expense of rafting the timber from the vessel into Wallasey Pool, and discharged his crew, as was usual on a ship's arrival at Liverpool. He then proceeded to discharge the deck cargo, and afterwards a considerable portion of the other cargo, by the usual mode, at the stern port; and after occupying in this way several days, the ship, on the 14th September, fell over and sustained damage. The captain always intended to take the vessel into Wallasey Pool with as much of the cargo on board as he could carry with safety: Held, that, under the above circumstances, the underwriters were not liable, the vessel having been moored in safety twenty-four hours after her arrival at her port of discharge.

ASSUMPSIT on a policy of assurance on the ship *Governor Halket*, at and from Liverpool to Quebec, during her stay there, and from thence back to her discharging port in the United Kingdom, and until she had moored at anchor twenty-four hours in good safety." Averment, "that the ship, with goods on board, departed and set sail on her voyage back from Quebec to her discharging port in the United Kingdom, to wit, Wallasey Pool; and afterwards, and whilst the ship was so proceeding on her voyage, and before she had arrived at her discharging port in the United Kingdom, to wit, at
[*128] Wallasey Pool aforesaid, or had been moored *at anchor at her said discharging port twenty-four hours in good safety," she was stranded, bulged, and damaged.

The defendant pleaded (with other pleas) a plea, traversing in terms the averment that the ship was lost while proceeding on her voyage, and before she had arrived back to her discharging port, and had moored at anchor twenty-four hours in good safety. Upon which issue was joined.

At the trial, before Rolfe, B., at the Liverpool Spring Assizes, 1847, it appeared that the vessel was chartered to take on board at Quebec a cargo of timber, and to proceed therewith to Wallasey Pool, in the river Mersey, or as near thereto as she could safely

get, and there discharge her cargo. On the 23rd of July, 1845, the vessel sailed from Quebec; on the 3rd of September she made Point Lynas, and on the following day anchored off the Bell Buoy, at the entrance of the river Mersey. The next day she was towed up the river by a steam-tug, and came abreast of Wallasey Pool; but, not being able to enter the pool for want of sufficient water, she anchored off Seacombe. The captain then proceeded to Liverpool to report the vessel; and on the 6th he discharged all the crew but eight men. He then commenced lightening the vessel for the purpose of getting into the pool, and engaged lumpers to discharge the cargo at a fixed rate of payment, which was to include the expense of rafting the timber from the vessel into the pool. On the 8th, he discharged the remainder of the crew, except the mate and carpenter, and unloaded all the deck cargo. The vessel being thus lightened, he was enabled to unload a considerable part of the cargo by the stern port; and he continued to discharge the cargo and raft the timber into the pool until the 14th of September, when she fell over and sustained the damage for which the present action was brought. It was proved that the captain always intended ultimately to take the vessel into Wallasey Pool, with as much of the cargo on board as he could carry with safety. On the opening of the defendant's *case, the learned Judge [*129] ruled, that, under the above circumstances, the underwriters were not liable, inasmuch as the vessel had moored in safety twenty-four hours after her arrival at her port of discharge, or as near thereto as she could safely do, and that the captain had discharged a substantial part of the cargo; and his Lordship directed a verdict to be entered for the defendant.

A rule *nisi* having been obtained to set aside the verdict, and for a new trial,

Martin and *Crompton* showed cause in Hilary Term (January 20):

The question is, at what time did the risk of the underwriters terminate? If the vessel had arrived at Wallasey Pool, and had there remained, with her crew on board, waiting to proceed to her place of destination, it cannot be denied that the policy would have been in force. But admitting the true construction of the policy to be, that the risk shall continue until the arrival of the vessel "at the wharf of her discharging port," still the ruling of the learned Judge was correct; for the captain had discharged his crew altogether,

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and had proceeded to discharge part of the cargo. On that ground the present case is distinguishable from *Samuel* v. *The Royal Exchange Assurance Company* (1). * * The correct rule on this subject is laid down in the case of *Leigh* v. *Mather* (2). There * * Lord KENYON said, "that where a ship is insured to any particular port of delivery, if by stress of weather she is forced into a different port, and there discharges part of her cargo, and afterwards proceeds to her port of delivery, he was of opinion that the policy remained good; but that where a ship, under a general policy to Jamaica, and until moored twenty-four hours, came to any port, and there voluntarily remained, and discharged part of her cargo, such, in his opinion, put an end to the policy, after remaining there twenty-four hours, whether the policy was on the ship or goods." In *Dalgleish* v. *Brooke* (3) [the same principle was applied]. So here, "the port of discharge" means that place where the captain thinks proper to commence discharging a substantial part of the cargo. Suppose the intention had been to discharge different portions of the cargo at three different docks; is the policy to remain in force until the vessel had entered every one of the docks? It is clear, that where the policy is on a voyage to an island or district comprehending several ports, the risk on the outward voyage ceases after she has been moored at the first port: Park on Insurance, 73; *Camden* v. *Cowley* (4).

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[131]

Watson and *J. Henderson*, in support of the rule:

The vessel's place of destination was Wallasey Pool, and the removal of part of the cargo was merely to enable the vessel to reach her port of discharge. The case of *Samuel* *v. *The Royal Exchange Assurance* (1) shows that the port of discharge" means the place where the cargo is to be ultimately discharged. Here part of the cargo was removed, but with the intention of lightening the vessel, not of discharging the cargo. At all events, the question of intention should have been left to the jury. [They cited *Waples* v. *Eames* (5).] A similar principle of construction will govern this contract as that relating to the lay-days allowed by a charter-party for a ship's discharge, which are to be reckoned from the time of her arrival at the usual place of discharge, and not at the port merely, though she should, for the purposes of navigation, discharge

[*132]

(1) 32 R. R. 352 (8 B. & C. 119).
(2) 5 R. R. 740 (1 Esp. 411).
(3) 13 R. R. 476 (15 East, 295).
(4) 1 W. Bl. 417.
(5) 2 Stra. 1243.

some of her cargo at the entrance to the port, before arriving at the usual place of discharge: *Brereton* v. *Chapman* (1). The cases of *Blackenhagen* v. *The London Assurance Company* (2), and **Brown* v. *Vigne* (3), show that the true criterion in this case is, what was the object and intention of the captain in discharging part of the cargo? It is stated in a note to *Brown* v. *Vigne*, that according to the report of the case of *Blackenhagen* v. *The London Assurance Company*, by Mr. Park (4), Lord ELLENBOROUGH said, "that though a ship, from necessity, might be allowed to take a circuitous course, yet the ultimate point of destination must ever be the same." *Dalgleish* v. *Brooke* (5) turned upon the meaning of the term "port of discharge," in a warranty against capture; in which case the term has been held to include the whole circuit of the sea or river where the owner elected to discharge. *Jarman* v. *Coape* (6), *Keyser* v. *Scott* (7), *Levin* v. *Newnham* (8), and *Raynor* v. *Pearson* (9), decided, that where the policy contains such a warranty, it is a question of fact for the jury, whether the place where the capture was made was the port where the ship meant to discharge. In the present case, the consideration of that question was wholly withdrawn from the jury. They also referred to *Laurie* v. *Douglas* (10).

[*133]

Cur. adv. vult.

The judgment of the COURT was now delivered by

ALDERSON, B.:

This was an action on a policy of assurance, on the ship *Governor Halket*, at and from Quebec to her port of discharge in the United Kingdom.

By the charter-party of the vessel, which was put in, the vessel was chartered to take on board a cargo of timber *at Quebec, and to proceed therewith to Wallasey Pool, in the river Mersey, or as near thereto as she could safely get, and there discharge her cargo.

[*134]

It appeared at the trial, that the vessel sailed from Quebec on the 23rd of July, 1845, and arrived in the Mersey on the 4th of September, and came to an anchor at the Bell Buoy in that river. The next morning she was towed up by a steam-boat, and came abreast of Wallasey Pool; but being unable to get into Wallasey Pool, by reason

(1) 33 R. R. 573 (7 Bing. 559).
(2) 1 Camp. 454.
(3) 11 R. R. 375 (12 East, 283).
(4) Park on Insurance, 383, 8th ed.
(5) 13 R. R. 476 (15 East, 295).
(6) 12 R. R. 374 (13 East, 394).
(7) 13 R. R. 721 (4 Taunt. 660).
(8) 14 R. R. 648 (4 Taunt. 722).
(9) 4 Taunt. 662.
(10) 71 R. R. 820 (15 M. & W. 746).

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of her too great draft of water, the captain anchored there, and proceeded to Liverpool to report the vessel, and engaged lumpers to discharge the cargo at a fixed rate of payment, which was to include the expense of rafting the timber from the vessel into Wallasey Pool, and discharged his crew, as was usual on a ship's arrival at Liverpool, altogether. He then proceeded to discharge the deck cargo, and afterwards a considerable portion of the other cargo, by the usual mode, at the stern port, from the hold of the vessel; and after occupying in this way several days, the ship being at anchor, on the 14th of September fell over and sustained damage, the subject of the present action; and the question is, whether the underwriters were at the time of this accident off the policy, by reason of the vessel having been moored in safety twenty-four hours after her arrival at her port of discharge. It appeared in evidence, that the captain always intended ultimately to carry the vessel into Wallasey Pool, with as much of the cargo on board as she could carry over the shallow part intervening between his original anchorage and the pool. But it was also clearly established, that the discharge of the cargo was going on in due course, and that if the water were not sufficient, and no accident had occurred, the whole cargo would have been discharged in the place where the vessel was moored.

[*135] My brother ROLFE held, under these circumstances, that *the underwriters were not liable, and we think he was right in so holding.

Here the ship was bound to Wallasey Pool, or as near thereto as she could safely get, and it is clear that that was the intended place for the discharge of her cargo. The cases on this subject are well collected in Mr. Hildyard's edition of Park on Insurance, vol. i. p. 73. We were referred in the argument to *Samuel* v. *The Royal Exchange Company* (1); but this case is clearly distinguishable from it, because there the vessel had not arrived at the place where any part of her cargo was ever intended to be discharged: the vessel here had on the 5th September arrived as near to Wallasey Pool as she could safely get, and did actually begin to discharge her cargo accordingly, discharging her crew altogether, and leaving none of them on board for the purpose of further navigation. The case of *Brereton* v. *Chapman* (2) does not appear to us at all to affect this question. There the vessel was still in progress to the ultimate place for the discharge of her whole cargo, and all that was done was to put on board lighters a portion of the cargo, in order that

(1) 32 R. R. 352 (8 B. & C. 119). (2) 33 R. R. 573 (7 Bing. 559).

the vessel might be enabled thereby without delay to proceed with them to the usual place of discharge. There the whole crew remained on board, and the vessel was in all respects really continuing her voyage. *Keyser* v. *Scott* (1), and *Dalgleish* v. *Brooke* (2), are authorities showing rather that "the port of discharge" includes the whole port within which any portion of the cargo is usually, according to the custom of such port, taken out of the vessel. These are authorities going on a totally different principle, viz., that of the construction of a warranty from seizure in the port of discharge; but, if at all applicable to the present question, they go further than this case requires us to do.

Upon the whole, we think that here the vessel had clearly arrived [136] at her port of discharge, and was actually in the course of discharging her cargo, and had moored there twenty-four hours in safety before the accident occurred. The rule therefore must be discharged.

Rule discharged.

THE NORTH AND SOUTH SHIELDS FERRY COMPANY *v.* BARKER AND OTHERS.

1848. *Feb.* 18.

[136]

(2 Ex. 136—152.)

In an action for the disturbance of a ferry, the first count of the declaration stated, that the plaintiffs were possessed of a ferry across the river Tyne, between North Shields and South Shields, for the conveyance of carriages, &c., and passengers, and that the defendants disturbed this ferry by carrying passengers. The second count stated a right to an ancient ferry. The defendants pleaded (*inter alia*) Not guilty, not possessed, and also that the boat used by the defendants was of less than four tons burthen. The Company was incorporated by the 10 Geo. IV. c. xcviii., for establishing a ferry across the river Tyne, within the limits of Tynemouth and the townships of South Shields and Westoe. Section 85 enacts, that, after the ferry shall be established, no other ferry shall be set up and used by any person across the river Tyne, within the said limits; and if any person (except the Company, or persons acting under their authority) shall use any boat or other vessel of the burthen of four tons or upwards, in ferrying for hire across the river within the limits aforesaid, every person so offending shall forfeit 5*l*. At the time the above statute passed, there was an ancient ferry across the river within the same limits, which the Company, under the powers of their Act, purchased of the owners: Held, first, that the word "burthen" in the 85th section, did not mean "register admeasurement," but capacity of carrying. Secondly, that the latter part of the 85th section did not limit the general right of ferry, but only added a cumulative remedy by way of penalty. Thirdly, that there was no variance by reason of the first count describing the ferry generally from North Shields to South Shields, and not from one particular terminus to another. Fourthly, that

(1) 13 R. R. 371 (4 Taunt. 660). (2) 13 R. R. 476 (15 East, 299).

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the mere act of ferrying passengers was a disturbance of the franchise, although the franchise was not of a prescriptive ferry, to the exclusion of all private boats, but simply of a ferry. Fifthly, that, on the purchase of the ancient ferry and completion of the new ferry, the former became extinct by operation of the Act of Parliament.

CASE. The first count of the declaration stated, that the plaintiffs, before and at the time of the committing of the grievances, &c., were and still are lawfully possessed of a certain ferry, with the appurtenances, upon and over and across the river Tyne, between the towns of North Shields, in the county of Northumberland, and South Shields, in the county of Durham, for the carriage and conveyance of carriages, horses, cattle, goods, wares, merchandise, and other portable articles, and foot passengers, over the said river Tyne, in boats and vessels kept by and by the authority of them, the plaintiffs, there for that purpose, taking for the same certain reasonable tolls, freights, and ferryages, [*137] *to the plaintiffs in that behalf due and of right payable. Yet the defendants, well knowing the premises, but contriving to disturb and injure the plaintiffs in the peaceable and lawful enjoyment of their said ferry, heretofore, to wit, on the 24th day of May, A.D. 1847, and on divers other days between that day and the commencement of the suit, unlawfully, injuriously, and wrongfully, against the will of the plaintiffs, carried and conveyed in a certain boat of them, the said defendants, divers foot passengers for hire, over and across the said river Tyne, and upon the said part of the said river where the plaintiffs had such ferry as aforesaid, and upon and within the said ferry of them, the plaintiffs; by reason whereof the plaintiffs have lost divers great gains and profits, which would otherwise have accrued to them from the said ferry; and have been disturbed and disquieted in the possession thereof, and in their right and title thereto.

Second count. That before and at the time of the committing the several grievances, &c., the plaintiffs were and still are possessed of a certain ancient ferry, with the appurtenances, upon and over and across the river Tyne, between the towns of North Shields, in the county of Northumberland, and South Shields, in the county of Durham, for the carriage and conveyance, for certain reasonable tolls, freights, and ferryages, to the plaintiffs in that behalf due and of right payable, of foot passengers over the said river Tyne, to the exclusion of all other persons carrying and conveying any foot passengers for hire over and across the said river Tyne, upon the part of the said river where the plaintiffs had and have such ferry as last aforesaid, save and except certain persons called scullermen, carrying and

conveying such passengers as aforesaid, in certain boats called sculler-boats. Yet the defendants, well knowing the premises, but contriving to disturb and injure the plaintiffs in the peaceable and lawful enjoyment of the said ferry, heretofore, to wit, on the 24th day of May, in the year of *our Lord 1847, and on divers other days and times between that day and the commencement of this suit, unlawfully, injuriously, and wrongfully, and against the will of the plaintiffs, carried and conveyed, in a certain boat of them, the said defendants, divers foot passengers for hire over and across the said river Tyne, and upon the said part of the said river where the plaintiffs had and have such ferry as aforesaid, and upon and within the said ferry of them, the plaintiffs; they, the defendants, at the said several times, &c., not being such scullermen as aforesaid, and the said boat in which &c. not being such sculler-boat as aforesaid; by reason whereof the plaintiffs have lost divers great gains and profits, which would otherwise have accrued to them from the said last-mentioned ferry, and have been disturbed and disquieted in the possession thereof, and in their right and title thereto.

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The defendants pleaded (*inter alia*), first, Not guilty. Secondly, to the first count, that the plaintiffs were not possessed of the ferry in that count mentioned. Thirdly, a similar plea to the second count. Fourthly, to the first count, that the plaintiffs are the body politic and corporate called the North and South Shields Ferry Company, mentioned in an Act of Parliament passed in the reign of his late Majesty King George the Fourth, being "An Act" &c., and that the ferry in that count mentioned is the same ferry which in and by the said Act is mentioned, and which the plaintiffs are thereby authorised and empowered to establish, keep, and maintain; and that at the said several times when &c., in the first count mentioned, the said boat, wherein the defendants carried and conveyed the foot passengers, was a boat of a burthen of less than the burthen of four tons, to wit, of the burthen of three and a half tons; wherefore the defendants, at the time when &c., carried and conveyed the said foot passengers, for hire, &c., where the plaintiffs had such ferry as in the first count mentioned, and within the said ferry of the plaintiffs, as the defendants *then lawfully might, for the cause in this plea alleged. Verification. The plaintiffs joined issue on the three first pleas; and to the fourth replied, that the boat in which &c., was a boat of a burthen not less than four tons, to wit, of the burthen of four tons, concluding to the country; and upon that replication the defendants joined issue.

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At the trial, before Wightman, J., at the Liverpool Summer Assizes, 1847, it appeared that the Dean and Chapter of Durham, from time immemorial, were possessed of a ferry across the river Tyne, within the limits of the parish of Tynemouth, on the north side of the river, and the townships of South Shields and Westoe, on the south side. The plaintiffs were incorporated by the 10 Geo. IV. c. xcviii., intituled "An Act for establishing a Ferry across the River Tyne, between North Shields, in the county of Northumberland, and South Shields, in the county of Durham," &c. (1). *The [*140] second section (2) empowers the Company to establish *a ferry. [*141]

(1) Sect. 1—"Whereas there is at present no convenient means of conveyance or communication across the river Tyne, between the towns of North Shields, in the county of Northumberland, and South Shields, in the county of Durham: And whereas, from the greatly increased and still increasing population of the said two towns of North and South Shields, there is much necessity for convenient means of intercourse between the inhabitants thereof; and it would greatly contribute to the advantage, accommodation, and safety of such inhabitants, and be of great public utility, to have a convenient ferry established for carriages, horses, cattle, goods, wares, merchandise, and other portable articles, and foot passengers, over the said river Tyne, between North and South Shields aforesaid; and to have a good road, avenue, way, or passage for such ferry, at North Shields aforesaid, to and into the main street of the low town of North Shields, called Duke Street; and, also, to have a good road, avenue, way, or passage, from such ferry at South Shields aforesaid, to and into the street called Dean Street, communicating with the market-place in South Shields aforesaid: And whereas the several persons hereinafter named are willing and desirous of undertaking the execution of the purposes aforesaid, and of being united into a Company for that purpose"—enacts, that certain individuals named, and other persons from time to time proprietors, "their respective successors, executors, administrators, and assigns, shall be, and they are hereby *united into a Company, for making, establishing, and maintaining a ferry across the river Tyne, between North and South Shields aforesaid, for carriages, horses, cattle, goods, wares, merchandise, and other portable articles, and foot passengers, with proper roads, avenues, ways, or passages, to and from such ferry, according to or consistently with the rules, orders, and directions hereinafter contained; and for that purpose shall be one body politic and corporate, by the name and style of 'The North and South Shields Ferry Company;' and by that name shall have perpetual succession and a common seal; and by that name shall and may sue and be sued, plead and be impleaded, at law or in equity, and shall and may prefer and prosecute any bill or bills of indictment against any person or persons who shall commit any felony, misdemeanor, or any offence indictable by the laws of this realm; and shall and may have power and authority, from time to time and at all times, to purchase and hold to them and their successors and assigns, any lands, tenements, and hereditaments, for the use of the said undertaking, in manner by this Act directed, without incurring any of the penalties or forfeitures of the Statutes of Mortmain; and also to sell and convey any of the lands, tenements, and hereditaments so purchased in manner by this Act directed." [*140, n.]

(2) Enacts, "that it shall and may be lawful for the said Company, and

The 9th section (1) enables the Company to treat with the owners for the purchase of houses and land, or of any ferry or ferries across the river Tyne. The 85th section enacts, "that from and after the said ferry, to be established by virtue of this Act, shall be made fit for carriages, horses, cattle, and foot passengers, no other ferry shall be set up and used, by any person or persons, across the said river Tyne, within the limits of the parish of Tynemouth, in the said county of Northumberland, and within the limits of the townships of South Shields, and Westoe otherwise Wivestoe, in the parish of Jarrow, in the said county of Durham; and if any person or persons (except the said Company, or other person or persons acting under their authority) shall use any boat, barge, float, draft, or other vessel, of the burthen of four tons or upwards, in ferrying or carrying any horse, cattle, or foot passenger, for hire, across the said river, within the limits aforesaid, every such person or persons so offending shall, for every such offence, forfeit and pay any sum not exceeding five pounds, to be recovered in manner hereinafter mentioned." By indenture of the 20th December, 1829, the Dean and Chapter of Durham, in consideration

they are hereby authorised and empowered, to establish, keep, and maintain a ferry, consisting of one or more steam or other boat or boats, barge or barges, float or floats, raft or rafts, or such other vessel or vessels as shall be sufficient and proper for the conveyance and passage of horses, carriages, cattle, goods, wares, merchandise, and other portable articles, and foot passengers, over and across the said river Tyne, between North Shields and South Shields aforesaid; and to erect and build ferry-houses and proper offices on each side of the said river, for the habitation and use of the ferrymen having the care and management of the said ferry so to be established as aforesaid, and for the convenience of persons using the same; and to make and keep in repair proper causeways, at the landing-places of the said ferry so to be established as aforesaid, on each side of the said river; and from time to time to do, or cause to be done, all other things necessary and convenient for establishing, maintaining, regulating, and managing the said common ferry, and making the same as useful and advantageous as may be; and all persons with carriages, horses, cattle, goods, wares, merchandises, and other portable articles, and all foot passengers, shall have free liberty to pass over the said ferry so to be established as aforesaid, (upon payment of the respective tolls hereinafter granted,) without any hindrance or interruption *of or by any person or persons whomsoever." [*141, *n.*]

(1) Enacts, "That it shall be lawful for the said Company to treat, contract, and agree with such person or persons, or body or bodies politic, corporate or collegiate, spiritual or lay, respectively, as shall be or be deemed to be the owner or owners of or interested in any houses, buildings, lands, tenements, or hereditaments, which may be necessary for the purposes of this Act, or of or in any ferry or ferries across the river Tyne, for the purchase thereof respectively, or for any loss or damage such owner or owners, or any of them, or any other person or persons, shall or may sustain by reason of the execution of any of the purposes of this Act."

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of one-fifteenth share of the net annual profits to arise from the ferry about to be established by the Company, "granted, released, assigned, and confirmed, to the Company and their successors," the ancient ferry, "to hold the said ferry, ferry-barge, and premises, with the appurtenances, *unto and to the use of the Company and their successors for ever." In May, 1847, the defendants, who were the promoters of an undertaking provisionally registered, and called "The Tyne Direct Ferry Company," commenced carrying passengers, for hire, across the river Tyne, within the limits of the plaintiffs' ferry, by means of a steam-boat of less than four tons burthen, register admeasurement, but capable of carrying about forty tons weight. It appeared that the sculler-boats had constantly plied for hire within the limits of the ancient ferry, without interference from the Dean and Chapter. On the part of the defendants it was submitted, first, that the word "burthen," in the 85th section, meant "register admeasurement," and not "capability of carrying," and consequently the defendants had not disturbed the plaintiffs' right of ferry, by plying with a boat of less than four tons burthen. Secondly, that the right of ferry was improperly described in the first count, inasmuch as, by the 85th section, the plaintiffs had only a limited right, to the exclusion of boats of four tons burthen and upwards. Thirdly, that the ancient ferry described in the second count had merged in the Parliamentary ferry. The learned Judge directed a verdict for the plaintiffs, reserving leave for the defendants to move to enter a verdict for them.

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Knowles, in last Michaelmas Term, moved to enter a verdict for the defendants, or to arrest the judgment on the second count:

The defendants are entitled to have the verdict entered for them upon the issue to the fourth plea, which is pleaded under the authority of the 85th section. The boat used by the defendants was a vessel under four tons, according to the ordinary method of measurement. By that mode vessels must contain a certain number of cubic feet per ton. The word "ton," which was formerly spelt "tun," seems to be derived from the vessels in which wine used to be carried, and formerly a duty was payable by importing vessels in a certain number of tons *of wine: 1 Blac. 315. The defendants' vessel did not contain the number of cubic feet requisite to make a vessel of four tons' burthen. The Pilot

[*143]

Act, 6 Geo. IV. c. 125, was in force when the present Act was passed.

(POLLOCK, C. B.: The words of the 85th section of this Act are, "any boat, barge, float-raft, or other vessel of the burthen of four tons." The word used is "burthen," and not "measurement." In ordinary language, "tonnage" is with reference to the number of tons a vessel is capable of carrying.

ALDERSON, B.: If the position for which you contend were correct, floats and rafts would be unprovided for by the Act, as they have no depth, and consequently are not capable of that sort of measurement.

PARKE, B.: The Act clearly means, by "burthen," capacity to carry; and by such a construction it applies to all the vessels enumerated, which it would not upon the other construction. Upon this point, therefore, there will be no rule.)

He then urged the objections taken at the trial, and also that there was a variance between the first count and the evidence, because the statute granted a ferry across the river Tyne, within the limits of the parish of Tynemouth on the one side, and the limits of the townships of South Shields and Westoe on the other side; whereas the first count alleged a right of ferry between North Shields and South Shields.

A rule *nisi* having been granted on these latter points,

Martin, *S. Temple*, and *Heath* showed cause (Feb. 12):

The first question is, whether the ferry is properly described in the first count. That count is framed on the 10 Geo. IV. c. xcviii.; and it is said that, under the 85th section of that Act, the Company have a limited right of ferry only, that is, to the exclusion only of boats of four tons burthen and upwards, and that the first count should have so described it. That, however, is not the true construction of the Act. The second section gives the Company an absolute right of ferry; the 86th section *only exempts scullermen [*144] from the penalty imposed on persons disturbing the ferry. The term "ferry" implies an exclusive right of conveyance. The definition given in the Termes de la Ley is—"A liberty, by prescription or the King's grant, to have a boat for passage upon a great stream, for carriage of horses and men, for reasonable toll."

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(ALDERSON, B., referred to *Huzzey* v. *Field* (1).)

The Company having, by the second section, an exclusive right of conveying passengers, &c., across the river from one district to another, are at common law entitled to bring an action for the infringement of that right. The meaning of the 85th section is, not that persons shall be at liberty to use boats under four tons' burthen, but the object of that enactment is to provide a summary remedy against persons using boats of that burthen and upwards. If the latter part of the clause had been omitted, the statute would clearly have operated as an absolute grant of the ferry. Then how can the mere imposition of a penalty on a particular class of persons restrain the general right? The former part of the section prohibits all persons from setting up another ferry; the latter part is cumulative on the former. In any other view the 86th section, which enables persons to use boats to go to vessels, would be unnecessary. A similar instance of a cumulative penalty will be found in the case of *Beckford* v. *Hood* (2), which arose on the Copyright Act. (They also cited *The Bailiffs of Tewkesbury* v. *Bricknell* (3) *Hinks* v. *Clerk* (4).)

Then as to the second count. The ancient ferry is not merged or extinguished by the grant of the Parliamentary ferry. By the second section of the 10 Geo. IV. c. xcviii., power is given to the Company to establish a ferry within certain limits. The 9th section enables the Company to purchase land, or "any ferry or ferries across the river Tyne." The 18th section provides, that, on payment of the purchase-money, the land, "ferry or ferries, [*145] together with *the yearly profits thereof, and all the estate, use, trust, and interest of any person or persons therein, shall from thenceforth be vested in and become the sole property of the Company for the purposes of the Act, for ever." The case of *The Kingston-upon-Hull Dock Company* v. *La Marche* (5) is relied upon by the other side. That case decided, that where premises vested in a Company for the purposes of a particular statute, their rights depend upon the statute, and must be limited by it. That principle is not denied, but it has no application to the present case. A ferry is *publicis juris*. It is a franchise which no one can erect without licence from the Crown; and when one is erected, another cannot be erected without an *ad quod damnum*: *Bliss t*

(1) 41 R. R. 755 (2 Cr. M. & R. 432).
(2) 4 R. R. 527 (7 T. R. 620).
(3) 1 Taunt. 143.
(4) 2 Lev. 252.
(5) 32 R. R. 337 (8 B. & C. 42).

v. *Hart* (1). Non-user is no answer to an action for disturbance of a right of ferry; but if there be a neglect of duty on the part of the owner, the Crown may on that ground repeal the grant by *scire facias* or *quo warranto*: *Peter* v. *Kendall* (2). If the grant of the Parliamentary ferry caused a merger of the ancient ferry, the latter might have been altogether lost; for, by the 31st section, the powers of the Company cease if their ferry be not completed within five years.

Knowles and *Unthank*, in support of the rule:

The ferry is misdescribed in the first count. It is true that the 2nd section gives the Company a right to establish a ferry, but the 85th section explains the nature of the right. The grant is in derogation of the common-law right of all persons to use a navigable river, and ought to be construed strictly. The 2nd and 85th sections, taken together, render it lawful for any person to use the ferry, provided he does so with boats of less than four tons burthen. If any ambiguity exists, the construction must be in favour of the public: *Waterhouse* v. *Keen* (3). The present case is governed by the principle laid down in *The Kingston-upon-Hull Dock Company* v. *La Marche*; namely, that where a person takes a beneficial grant under an Act of Parliament, he only takes such right as is clearly and unambiguously granted. A Parliamentary grant of a ferry does not of itself exclude any other ferry; such right can exist only by immemorial custom. It is analogous to the grant of a port or of a market: Hale, De Portibus Maris; *The Mayor of Macclesfield* v. *Chapman* (4). The precedents of an exclusive right of ferry, allege a right to carry "all" passengers: that word is not found in this Act of Parliament. But even assuming that the Company are entitled to an exclusive right of ferry, there is nevertheless a variance between the first count and the proof; for the statute only gives a right of ferry between certain termini, which are specifically defined, and not from North Shields to South Shields. All persons would have a right to use the river as a public highway, from or to all places on its banks, not in the line leading from one terminus to another: *Huzzey* v. *Field* (5). [*146]

They then argued that the ancient ferry was not extinct, and relied upon the recital of the statute, and also the language of the 9th, 18th, and 85th sections.

Cur. adv. vult.

(1) Willes, 508.
(2) 30 R. R. 504 (6 B. & C. 703).
(3) 40 R. R. 858 (4 B. & C. 208).
(4) 67 R. R. 240 (12 M. & W. 18).
(5) 41 R. R. 755 (2 Cr. M. & R. 432).

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The judgment of the COURT was now delivered by

PARKE, B.:

In this case, which was argued before us a few days ago, on showing cause against a rule to enter a verdict for the defendants upon some points reserved at the trial, several questions were discussed.

The declaration contained two counts, one stating the plaintiffs to be possessed of a ferry across the Tyne, between North Shields
[*147] and South Shields, for the conveyance of *carriages, &c., and passengers; and that the defendants disturbed this ferry by carrying passengers. The second count stated an ancient right of ferry, to the exclusion of all other persons carrying foot-passengers for hire over the river on that part where the plaintiffs had a ferry, save and except scullermen carrying in sculler-boats.

Not guilty was pleaded, and possession of the ferries traversed.

One objection was made, which may be immediately disposed of, viz. that there was a variance between the allegation in the first count and the evidence, because by the Act of Parliament the ferry was granted from a particular terminus to another, and not generally from North Shields to South Shields; but this objection was not taken at the trial, and therefore it is unnecessary to consider whether it is a variance or not, though it really is not, as the point was decided in *Pim* v. *Curell* (1).

The more important objection was, that there was a misdescription of the ferry, as the Act of Parliament, (10 Geo. IV. c. xcviii.), looking at the whole of its provisions, granted to the Company a limited right of ferry only, that is, to the exclusion only of boats of four tons burthen and upwards, and that the declaration did not allege that the defendants' boat was of that burden or upwards.

It was urged by *Mr. Knowles*, and properly, that this Company, taking a beneficial grant under an Act of Parliament, took only such right as was clearly and unambiguously granted, according to the principle laid down in *The Hull Dock Company* v. *La Marche* (2) and other cases.

Now, under the 1st section, the plaintiffs were erected into a corporation for establishing, and by the 2nd section had the power of establishing a ferry; and by this section they would have the same right as under a Royal grant of the franchise of a ferry, which
[*148] would entitle them *to bring an action against any one who

(1) 55 R. R. 600 (6 M. & W. 249). (2) 32 R. R. 337 (8 B. & C. 42).

infringed their right, which is in the nature of a monopoly, by carrying persons from or to the same place, who otherwise, presumedly, would have gone by the ferry.

But it is insisted that the 85th section qualifies that right, and limits it [to] a right of ferry not by any boats, but by boats of four tons burthen and upwards, to the exclusion of all boats of that burthen, and no other. We do not think that this is the proper construction of the 85th section. The latter part does not appear to us to limit the general right of ferry given by the 1st and 2nd sections, but only to add a cumulative remedy by way of penalty, which is perfectly consistent with the existence of a general right. This view of the case is somewhat assisted by the consideration that the 86th section would have been unnecessary, if the intention of the Legislature had been that all boats under four tons burthen should be unaffected by the grant of ferry: in that case there would have been no occasion for such a provision by way of greater caution. The argument, however, is not of much weight, because in any view of the case the clause was superfluous; but, unless on the supposition that all boats were meant to be excluded from the privilege of carrying over passengers, the necessity of this cautionary provision respecting all boats would not have occurred to the framers of the Act.

Upon the ground, however, that the general right of ferry, clearly given by the 1st and 2nd sections, is not qualified by the 85th section, we think there is no misdescription of the right of ferry in the first count.

Another objection was made by *Mr. Unthank*, that the mere act of ferrying a passenger across was no disturbance of the franchise, unless the franchise was not simply of a ferry, but of a prescriptive ferry to the exclusion of all private boats; and he likened it to the case of a market, the grant of which franchise does not of itself imply a right to prohibit the selling in shops on a market day, *Mayor of* **Macclesfield* v. *Chapman* (1), that right belonging only to [*149] immemorial markets, to which a special custom to exclude such sales belongs: *Mosley* v. *Walker* (2). We do not assent to this distinction. In the case of a ferry, the act of taking across a person who would otherwise have gone by it is actionable, as the preventing a person from coming to a market to buy or sell there would be in the case of a market; and many instances are found, in the reported cases, of such infringements. The setting up a ferry is

(1) 67 R. R. 240 (12 M. & W. 18). (2) 31 R. R. 146 (7 B. & C. 40).

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not the only infringement. A ferry is a highway for all the Queen's subjects paying the toll; and whether it is described in the declaration, as it is in most cases, as a ferry for all persons having occasion to use it, or, as it is in some, for persons having occasion to use it, the right is the same.

The counsel for the defendants then objected to the second count, that the ferry described in it was extinct. That is a question of some nicety. This ferry was one which had belonged to the Dean and Chapter of Durham, and had been purchased by the plaintiffs from them soon after the Act of Parliament was passed; and it was contended that this was extinguished not by the Act of Parliament itself, for it is clear this ferry was meant to continue afterwards, and to be the subject of purchase or compensation by the Company, but that the meaning of the Act was, that when bought, and the new ferry completed, the old ferry should cease to exist; the intention being, that one ferry only should at any time exist, and be under the control and direction of the plaintiffs.

Upon full consideration of all the clauses in the Act of Parliament bearing upon this question, we are led to the conclusion that this view of the case is correct, and that it is inconsistent with the whole scope of the Act, that the Company should carry on more than one ferry; though they are empowered to purchase other ferries for the
[*150] purpose of *preventing the necessity of compensation from time to time, or at once, for the injury done to them. The result will be, that, in order to carry the intention of the Legislature into effect, the ferry, when purchased, and when the new ferry was finished, became extinct by the operation of the Act.

The recital in the Act is, that it would be of great public utility to have a convenient ferry established with certain communications, which clearly indicate that it was meant to be on one particular spot. The individuals named are then incorporated for making, establishing, and maintaining a ferry, according to, or consistently with, the rules, orders, and directions thereinafter contained; and the 4th and 5th sections show that this is to be a ferry in a particular place, and according to a map or plan; and for the use of this undertaking the power is given to purchase lands, tenements, and hereditaments, without incurring the penalties of the Statutes of Mortmain. The 2nd section empowers the Company, so incorporated, to establish, keep, and maintain a ferry, that is, one ferry only, and provide boats, build ferry-houses, and make, and keep, and repair proper landing-places and causeways to that ferry. The

36th section, enabling the Company to mortgage, gives a form which mortgages one ferry only. The 45th section enables the Company to make bye-laws for the regulation of that ferry, and the conduct of the persons employed in it, or making use of it: the 51st section, to make contracts with engineers, &c., for maintaining and improving the said ferry. The 69th section imposes a penalty for obstructing the ferry. The 70th empowers the Company to demand tolls within certain limits, for passing the said ferry. The 75th prevents collectors of those tolls from taking undue tolls, or misbehaving themselves. The 82nd imposes penalties for evading the tolls.

Now, it does appear to us to be unreasonable to suppose that the Legislature meant the purchased ferry to continue *and be managed [*151] by the Company without any express powers to maintain it, to repair the ferry-houses and landing-places, or provide boats, or regulate the use of it, without imposing any limit upon the tolls to be collected or penalties upon the obstruction of it. It is also an observation worthy of remark, in confirmation of this view of the case, that the 28th section, which enables the Company to re-sell, does not expressly authorise the re-sale of ferries.

Considering all these provisions, and looking at the express object of the incorporation of the Company, the making and maintaining a ferry, we think that the powers of the Company are confined to one ferry, and consequently the authority to purchase ferries must be construed to mean an authority to acquire them for the purpose of preventing competition, and at once satisfying the claims of the proprietors for compensation.

There is one section only which has a different aspect. The 18th section provides, that on payment or tender of the purchase-money, not merely the land, but the ferry or ferries, together with the yearly profits thereof, and all the estate, &c., shall thenceforth be vested in the Company, for the purposes of the Act, for ever. This expression, as to the yearly profits, which is not confined to lands, affords an argument that the ferry, or ferries, were intended to be kept up. The words, however, may be explained as meant to apply to the intermediate profits, after the purchase, and before the ferry which the Company were to set up was completed, until which time the old ferry would not cease. At any rate, this expression does not appear to us to avail against the very strong inference to be derived from the other clauses of the Act, and its general scope, that only one ferry was to belong to the plaintiffs at one time. We

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therefore think, that the issue on the last count, on the plea denying the plaintiffs' possession of the ancient ferry, must be found for the defendants.

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The question of variance on this plea it is therefore *unnecessary to consider; on the authority of the case of *The Bailiffs of Tewkesbury* v. *Bicknell* (1), we should probably hold the count to be proved.

The rule must therefore be discharged as to the first count, and absolute to enter a verdict for the defendants on the issue on "not possessed" to the second count.

Rule accordingly.

1848.
Jan. 27.
Feb. 9.

BATES *v.* TOWNLEY AND ANOTHER (2).

(2 Ex. 152—166; S. C. 12 Jur. 606.)

[152]

An award is not evidence of an account stated between the parties to the submission.

By articles of agreement between the plaintiff of the one part, and the defendants of the other part, certain differences between them were referred to arbitration, the costs of the reference and award to be in the discretion of the arbitrators. The arbitrators, after finding a sum due from the defendants to the plaintiff, awarded that the costs of the reference and award, including compensation to the arbitrators, should be borne as follows; that is to say, one moiety thereof by the plaintiff, and the other moiety by the defendants. The plaintiff took up the award, and paid the whole costs of it: Held, that he could not recover a moiety of the costs as money paid for the use of the defendants.

ASSUMPSIT for money paid by the plaintiff for the use of the defendants, and for money due on an account stated between them. Plea, *Non assumpsit.*

At the trial, before Coltman, J., at the Chester Spring Assizes, 1847, it appeared that the plaintiff and defendants were stock-brokers, the former residing at Leeds, the latter at Liverpool; and that the plaintiff having claims against the defendants for money due in respect of dealings in railway shares, it was agreed that the matter should be referred to arbitration. Accordingly, on the 5th February, 1847, articles of agreement were entered into between the plaintiff of the one part, and the defendants of the other part, whereby, after reciting that "differences and disputes had arisen and were pending between the parties thereto, touching, or concerning, or arising out of certain dealings or transactions in railway

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shares," &c., it was witnessed *that the parties thereto respectively

(1) 11 R. R. 537 (2 Taunt. 120).
(2) See *Crampton* and *Holt* v. *Ridley & Co.* (1887) 2 Q. B. D. 48, 19 L. J. Ex. 399.

agreed to refer the same to, and "abide by, the award, arbitrament, final end and determination of J. Head, of &c., a person chosen by or on behalf of the plaintiff, and J. Mills, of &c., a person chosen by or on behalf of defendants, and of such third person as should, before they should proceed on the said reference, be chosen by them, and appointed by writing under their hands, to be indorsed on those presents," &c. And it was further agreed, "that the costs of the reference and of the award to be made in pursuance thereof, including a reasonable compensation to the said arbitrators for their trouble, should be in the discretion of the said arbitrators, or any two of them, who should by their said award order and direct by whom, and to whom, and in what proportions and manner, the same should be paid; and, for the better enforcing performance of the award, either party should be at liberty to make the submission a rule of the Court of Common Pleas." The two arbitrators proceeded with the reference, and appointed a third, but his appointment was not indorsed on the submission, as required by it. On the 18th February, 1847, the three arbitrators made their award, whereby they "did award, find, and determine, that there was due from the defendants to the plaintiff in respect of the matters of difference referred to them the said arbitrators as aforesaid, the sum of 2,039*l.* 10*s.* 3*d.*, which sum they did thereby award and direct that the defendants should pay to the plaintiff at the office of Mr. R. Norris, solicitor, North John Street, Liverpool, on Monday, the 1st day of March then next, at twelve o'clock at noon, in full satisfaction of the matters in difference." And they "did further award, that the costs of the said reference, and of that their award, including the compensation to them the said arbitrators for their trouble, should be paid and borne as follows; that is to say, one moiety thereof should be paid and borne by the plaintiff, and the other moiety thereof by the defendants." On the 22nd February the plaintiff took *up the award, and paid the whole costs [*154] of it, amounting to 25*l.* 8*s.* 9*d.*, and on the following day served the defendants with notice thereof, but there was no express request to pay. The plaintiff now sought to recover 12*l.* 14*s.* 9*d.*, the moiety of those costs, as money paid for the defendants' use. The declaration contained a count on the award, which had been demurred to, and judgment given for the defendants (1); so the plaintiff now relied upon the award itself as evidence of an account stated. On the part of the defendants, it was objected that the plaintiff was not

(1) 74 R. R. 772 (1 Ex. 572).

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entitled to recover the moiety of the costs as money paid for the defendants' use, on the ground, first, that the award was not binding, the appointment of the third arbitrator not having been indorsed on the submission; secondly, that the costs of the reference was not ascertained, either by the award or by the taxation of the Court. In answer to the first objection, evidence was given of a waiver of the condition. It was also objected, that the award was not evidence of an account stated. The learned Judge directed a verdict for the defendants on the count for money paid, and for the plaintiff on the account stated, reserving leave for each party to move to enter a verdict.

Cross rules having been obtained accordingly,

Cowling, *Townsend*, *Egerton*, and *Burnie*, in Hilary Term, (January 27), showed cause against the defendants' rule to enter a verdict for them on the account stated:

It is conceded, that an award is not in every case evidence of an account stated; if, for instance, it directs a mere collateral matter, such as the building of a house, or if it be made respecting a claim for unliquidated damage, as in trespass for assault and battery. But where the submission is in respect of a debt, or a claim in the nature of a debt, the *parties must be taken to have appointed the arbitrator as their agent to settle the account.

[*155]

(PARKE, B.: If the arbitrator is an agent, the principal might maintain an action against him, should he, through neglect, find a sum to be due which was not due. Is it not an abuse of the term, to say that an arbitrator who is to exercise his own judgment, is an agent?)

An arbitrator has no discretionary power to award any sum he may think fit, but only to find what is in point of fact due.

(POLLOCK, C. B.: An arbitrator is not an agent; his award is a judicial act.)

In *Keen* v. *Batshore* (1), where matters of account in dispute were submitted to arbitration, but not by bond, and the arbitrator awarded a certain sum to be due to the plaintiff, EYRE, Ch. J., ruled that the sum awarded might be given in evidence under

(1) 1 Esp. 195.

the common counts in assumpsit, and particularly as an account stated.

(PARKE, B.: That case proceeded on the ground that there were no arbitration bonds, and therefore it could not be treated as a reference.)

The doctrine does not seem intended to be confined to such a case; indeed, if it be correct with respect to a verbal submission, it is equally so where the submission is in writing. * * *

(PLATT, B.: How can a party be charged with an account stated, unless he agrees to the account?)

* * But if an award is not of itself an account stated, it may [156] at all events be used as proving a prior account stated; for an admission by a party, of anything due, is an admission of an account stated.

(PARKE, B.: It is settled, that there cannot be an account stated by a defendant, except with the plaintiff or his agent. It would not do to say, that defendant was heard to tell a stranger that he owed the plaintiff a certain sum of money.)

The object of stating an account is, to enable the creditor to recover the debt, without proof of the consideration.

(POLLOCK, C. B.: The count is on an account stated between the parties; then how can you infer privity from a statement to a third person?)

In the ordinary case of an account stated, the plaintiff does not prove a prior debt, but only an admission of a debt due.

(PARKE, B.: It is distinctly laid down in *Brekon* v. *Smith* (1), that the admission must be made to the opposite party or his agent. Some five-and-twenty or thirty years ago, very loose expressions might have done, but in more recent decisions the good sense of the matter prevails. The difficulty here is, to see how the independent act of a Judge, *generally given against the consent of the [*157] party who is to pay, can be used as an account stated between the parties.)

(1) 1 Ad. & El. 488.

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An award, by which parties agree to abide, cannot be considered as a decision *in invitum*. This case comes within the principle of *Freeman* v. *Bernard* (1).

(PARKE, B.: The distinction there pointed out by Lord HOLT makes the matter clear; he says, "Where an award creates a new duty, instead of that which was in controversy, the party has remedy for it upon the award; and, therefore, if the party resorts to demand that which was referred and submitted, the arbitrament is a good bar against such action. *Contrà*, where the award does not create a new duty, but the old duty, by a release of the action.")

In *Porter* v. *Cooper* (2), PARKE, B., says: "I take the rule to be this, that if there is an admission of a sum of money being due, for which an action would lie, that will be evidence to go to the jury on the count for an account stated."

(ALDERSON, B.: That must mean an admission to the creditor himself.)

In *Slack* v. *Buchannan* (3), Lord KENYON ruled, that admissions made by a party at a reference, which proved abortive, were receivable in evidence, provided they were such as the defendant would be obliged to make in his answer to a bill of equity.

(ALDERSON, B.: Those are clearly admissions to the party: an answer in equity, is an answer to the plaintiff.)

They also cited *Kingston* v. *Phelps* (4), *Whitehead* v. *Tattersall* (5), [*Salmon* v. *Watson* (6), and *Allen* v. *Milner* (7).]

Welsby and *Davison* appeared to support this rule, but were not called upon.

POLLOCK, C. B.:

The rule must be absolute. The point is shortly this—whether an arbitrator is an agent for the parties to the submission so as to bind them by his award, *as on account stated between them? I am clearly of opinion that he is not. Suppose a reference to two persons, or an umpire chosen by them, how could the umpire be

[*158]

(1) 1 Ld. Ray. 247.
(2) 1 Cr. M. & R. 387.
(3) 1 Peake, N. P. 5.
(4) 1 Peake, N. P. 299.
(5) 40 R. R. 342 (1 Ad. & El. 491).
(6) 4 Moore, 73.
(7) 2 Cr. & J. 47.

considered as the agent of the parties? Or, suppose a reference to one person, could he be deemed the agent of the parties, so that a decision in his own mind is to be considered as a settlement of accounts between them. The cases cited are essentially different. In *Keen* v. *Batshore* (1), the reference went on without bonds, and EYRE, Ch. J., thought it reasonable that the parties should have intended to do something by the reference; and, as bonds were not executed so as to make the person who acted an arbitrator, he told the jury that he was the agent of the parties, and therefore the consent to the reference bound them in the same way as if an account had been stated between their agents. That does not go the length of the present case, nor can I find in the text-books any authority which does. On the contrary, Mr. Watson, in his book on Awards, cautiously puts the decision exactly as it was, namely, that an award, under the circumstances of that case, was allowed to be given in evidence as an account stated. The other cases cited do not in any degree show that an arbitrator has authority as agent of the parties. It would be confounding matters essentially different, if we were to hold that an arbitrator, who is a Judge to decide between two parties, is an agent so as to make his award evidence of an account stated.

PARKE, B.:

I concur in thinking, that there is no room for any doubt. The counsel for the plaintiff began their argument by assuming that this is a submission to settle items of a pecuniary demand. They acknowledge that, if the claim were for unliquidated damages, the position contended for could not be supported. Their argument then *fails *in limine*, because it is a submission in respect of [*159] unliquidated damages, namely, a claim arising from the non-delivery of railway shares. Even if the submission were in respect of pecuniary matters only, the award could not be given in evidence under an account stated, because an arbitrator is not the agent of the parties to settle their accounts, in which case the act of the agent would be the act of the principal, and the principal would have his remedy over against the agent, if he settled them improperly; but an arbitrator is a Judge constituted by the parties, and who is to form his own judgment on the facts, and make an award binding on each party. In the absence of all authority, it seems to me that this award is not evidence of an account stated. It is not

(1) 1 Esp. 195.

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at all like the case where two persons meet together and agree upon the sum due from the one to the other, which is a statement of account. If there were any authorities in point, we should be bound by them, however much we might regret that the causes and forms of action should be so confounded. But the only case bearing on the subject is that of *Keen* v. *Batshore* (1), which is a short note of a Nisi Prius decision; from which, however, it is perfectly clear that Chief Justice EYRE, a very eminent Judge, thought that, as there was no regular agreement to refer, constituting the arbitrator a Judge, he must be considered as a delegate or agent for the parties; and his decision proceeds solely on the ground that the award in that particular case must be considered as a settlement of account by an agent appointed by each party; and it is clear that, if regular bonds of submission, or a regular submission to arbitration, had been entered into, he would not have admitted the award as evidence of an account stated. It therefore appears to me that there is no foundation for saying that this award, which must be taken as regularly drawn up, and which is a settlement of all
[*160] demands, both *liquidated and unliquidated, can possibly be said to be an account stated. The authorities cited are not sufficient to support such a proposition. The one mainly relied on, that of *Keen* v. *Batshore*, is (as already stated by the LORD CHIEF BARON) a case to which Mr. Watson does not appear to have attached much weight, as he merely states that it was so laid down.

ALDERSON, B.:

I am of the same opinion.

PLATT, B.:

An account stated is a settlement of account, in which both parties, or their agents, agree upon the amount due from the one to the other. Is, then, an arbitrator the agent of the parties for the purpose of stating an account? It seems to me that he acts not as agent, but as a Judge; for, in many points, his decision would be adverse to the consent of either party.

Rule absolute.

Welsby and *Davison* then showed cause against the plaintiff's rule to enter a verdict on the count for money paid:

The law will not imply a promise to repay the plaintiff the moiety of fees paid by him on taking up the award. Before the case of

(1) 1 Esp. 195.

Brittain v. *Lloyd* (1), a notion prevailed, that, in order to support a count for money paid, the effect of the payment must have been to relieve the defendant from some liability. It is now, however, settled that the action is maintainable in every case in which the plaintiff has paid money to a third party, at the request, either express or implied, of the defendant, with an understanding, either express or implied, to repay it. The request to pay and the payment constitute the debt. But in this case there has been no request either express or implied, nor has the payment been made in consequence of any liability *which the defendant was under. [*161] The money is ordered to be paid by each of the litigant parties in moieties, and there was no duty on either to pay more than his proportion. And as the misconduct of the arbitrators disentitles them to sue for their fees, in point of law it is not money payable at all.

(PARKE, B.: The plaintiff might not have been able to get the award without paying the whole of the fees.)

The Court will not assume that each party, upon notice, would not perform his duty and pay a moiety of the fees. * * No implied request could arise before payment, and that is made under an award which is void. * * Either the award is void as leaving undecided a matter submitted to the arbitrators, namely, the amount of their compensation; *or if the award be good, it must [*162] be so on one of these two grounds, viz. that the arbitrators must be considered to have waived their fees, or that the amount is ascertainable by the Master on taxation of costs. If the fees are waived, the plaintiff has clearly made a voluntary payment in his own wrong; if the fees are not waived, they cannot be ascertained by reference to the Master. [They cited *Dossett* v. *Gingell* (2), *Swinford* v. *Burn* (3), *Hicks* v. *Richardson* (4), and *Stokes* v. *Lewis* (5).]

Cowling, Townsend, Egerton, and *Burnie, contrà*: [163]

By the terms of the submission the parties agree to be bound by the award, and no notice was given that the defendant intended to object to it until two days after the plaintiff had taken it up. The arbitrators direct, that, as between the parties, the amount of costs shall be paid in moieties—not that each party shall pay to the

(1) 69 R. R. 816 (14 M. & W. 762).
(2) 58 R. R. 593 (2 Man. & G. 870).
(3) Gow, N. P. 7.
(4) 4 R. R. 768 (1 Bos. & P. 93).
(5) 1 T. R. 20.

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arbitrators a moiety; that they leave to be understood according to the usual practice, which is for the one party to pay the whole and recover from the other his moiety. The language used is with reference to the ordinary mode of proceeding.

(PARKE, B.: The question is, whether the plaintiff, by taking up the award, does not stand in the same situation as the arbitrators, and acquire all the rights which they possessed of enforcing payment of their fees. In the case of *Hicks* v. *Richardson* (1), it was considered by EYRE, Ch. J., that an arbitrator might recover his fees by attachment; and that case seems to explain how the party taking up the award can be reimbursed, namely, by getting an attachment and standing in the place of the arbitrator. There is no difficulty in saying that these arbitrators are entitled to compensation, because there is an agreement that they shall have it; the only question is, how that is to be enforced. Can an action be maintained the moment the money is paid? if so, it would be a great hardship on the other side).

The case of *Hicks* v. *Richardson* was approved of by Lord ELLENBOROUGH in *Stokes* v. *Lewis* (2). *Swinford* v. *Burn* (3) shows that DALLAS, Ch. J., thought the action would lie. [*164] The present case is not unlike that of a bill of *exchange upon which two persons are jointly liable, and where, if one has paid the whole amount, he may recover a moiety from the other. Assuming, then, that the plaintiff might have recovered if the award had been valid and had mentioned the amount of compensation, the non-existence of those circumstances makes no difference. Until the plaintiff took up the award, he had no means of knowing in what proportions the costs were to be paid. Immediately the money is paid he is entitled to contribution, and the common count is applicable. (They also cited *Kemp* v. *Finden* (4), *Gwynne* v. *Burnell* (5), *Pitt* v. *Purssord* (6), *Davies* v. *Humphreys* (7), *Hoggins* v. *Gordon* (8), *Prior* v. *Hembrow* (9).)

Cur. adv. vult.

The judgment of the COURT was now delivered by

PARKE, B.:

The only question remaining for consideration in this case was,

(1) 4 R. R. 768 (1 Bos. & P. 93).
(2) 2 Smith, 12.
(3) Gow, N. P. 7.
(4) 67 R. R. 384 (12 M. & W. 421).
(5) 6 Bing. N. C. 453.
(6) 8 M. & W. 538.
(7) 55 R. R. 547 (6 M. & W. 153).
(8) 61 R. R. 257 (3 Q. B. 466).
(9) 58 R. R. 891 (8 M. & W. 873).

whether the plaintiff was entitled to recover 12*l.* 14*s.* 9*d.*, a moiety of the sum paid by him in taking up the award, as money paid. There was no pretence to say that the defendant requested the plaintiff to pay for him, so as to render himself liable on that account. The ground on which the plaintiff must recover, if at all, is that the defendant had consented that he should be in a situation in which he might be compelled to pay the money on the defendant's account; that he was compelled, and so made the payment by the implied request of the defendant. In order to prove this case, the plaintiff must show, that both the parties became jointly liable to the arbitrators for the sum that was paid to them,. that it was due at the time it was paid, and that the defendant is bound, as between *themselves, to pay a part. Whether the liability was [*165] to both the arbitrators jointly, or to each for his portion, (which would have been very material if they brought an action), is now immaterial, as the payment has been made to both.

The first point to be considered is, whether both the parties were jointly liable to the arbitrators to pay them for their trouble. This depends upon the question, whether the arbitrators were parties to the submission, and agreed to be paid on the terms contained in it only. If they were, then they had a remedy only against each for the part which they by their award should direct each to pay, and so this action could not be maintained. It seems to us, however, that the arbitrators were not employed on those terms, though my LORD CHIEF BARON has a doubt on this point. We think, the submission being expressly by agreement between the plaintiff and defendant, they only are parties to the instrument, and there is no contract by it with the arbitrators; and the effect of the agreement is to give power to the arbitrators to decide, *inter se*, in what proportions each party is to be liable to pay the expenses of the reference, including, *inter alia*, the recompense to the arbitrators. This contract of the two parties is evidence by their own admission that the arbitrators were to be paid for their trouble, and might be used for that purpose, if the arbitrators had to sue the parties for their services; but it is no agreement between the employers and the employed, binding the latter to this mode of payment.

This being so, both the parties, having jointly employed the arbitrators, would, as between them and the arbitrators, be jointly liable to pay a reasonable compensation, and when it should become due: but neither of them would be bound to pay, unless both these circumstances should concur; and, in order to recover contribution,

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the plaintiff must show, that by the award a definite portion of this sum was to be paid by the defendant, for the award regulates the proportion *inter se*.

[166] Now, on referring to my brother COLTMAN'S notes, we find that *Mr. Welsby* objected that some of these conditions were not complied with.

First, that the award was not binding, as the condition of the submission was not performed; and if so, the arbitrators would not be entitled to recover, and the plaintiff not bound to pay, for they could be entitled only if they made a valid award. This objection appears to have been answered by evidence of the waiver of that condition; and unless the jury had been satisfied of that, the verdict would not have been found on the account stated. He objected, in the next place, that the costs of the reference were not ascertained by the award, or by the taxation of the Court, the reference being capable of being made a rule of Court. Now this we think a fatal objection.

Without saying whether the remuneration to the arbitrators for their trouble ought to have been ascertained, either by the award or by taxation, the residue of the costs of the reference ought to have been ascertained in one of these ways, before the amount payable by the defendant could be ascertained. All the costs of both sides, as well as the costs of and recompense to the arbitrators, are to be divided by the terms of this award; for the award is not that each party is to pay his own costs of the reference, and one moiety of those of the arbitrators, but one moiety of all brought into hotchpot; so that whether the defendant would have anything to pay, or how much, to the plaintiff, could not be ascertained until then.

Rule discharged.

1848. *Feb.* 14, 15, 16.

BURON *v.* DENMAN (1).

(2 EX. 167—190.)

[167]

The defendant, a naval commander, stationed on the coast of Africa, with instructions to suppress the slave trade, was requested by the Governor of Sierra Leone to obtain the liberation of two British subjects detained as slaves at the Gallinas by the son of the King of that country, and in effecting that object to use force, if necessary. He accordingly proceeded to the Gallinas with an armed force, and, having landed at Dombocorro, took military possession of a barracoon belonging to the plaintiff, who was a Spaniard, carrying on the slave trade at the Gallinas. He then communicated with the King of the country, and the two British subjects

(1) Cited by MALINS, V.-C., *Doss* v. *Secretary of State for India in Council* (1875) L. R. 19 Eq. 509, 532.

having been released, the defendant concluded a treaty for the abolition of the slave trade in that country. In execution of this treaty, the defendant fired the barracoons of the plaintiff, and carried away his slaves to Sierra Leone, where they were liberated. Some of the plaintiff's goods, used in the slave traffic, were claimed by the King as forfeited, and delivered up to him; other goods were destroyed. These proceedings having been communicated to the Lords of the Admiralty, and the Secretaries of State for the foreign and colonial departments, they respectively, by letter, adopted and ratified the act of the defendant: Held, first, that the plaintiff had a property in his slaves, and might maintain trespass for their seizure, the slave trade not being piratical by the law of nations, and it not appearing that Spain had passed any law abolishing the slave trade pursuant to the treaty embodied in the 6 & 7 Will. IV. c. 6.

Secondly, that the ratification of the defendant's act by the ministers of State was equivalent to a prior command, and rendered it an act of State, for which the Crown was alone responsible, (PARKE, B., *dubitante*): and that such defence was open under the general issue.

TRESPASS. The first count of the declaration stated, that the plaintiff, during all or any of the time in that count mentioned, was not a subject of the Sovereign of these realms, and so not being such subject as aforesaid, heretofore, to wit, on &c., was lawfully possessed of certain slaves, goods, chattels, effects, &c., then being without the dominions of the Sovereign of these realms, (that is to say), of divers, to wit, 4,000 slaves, of great value, to wit, of the value of 100,000*l.*, and of divers goods, chattels, effects, (that is to say), &c., and continued so possessed until the defendant afterwards, and whilst the said slaves, goods, chattels, effects, &c. were so respectively without the dominions aforesaid, and whilst the plaintiff was so possessed and was not subject as aforesaid, to wit, on &c., with force and arms, seized, took, and carried away the said slaves, goods, chattels, effects, &c., whereby the same became and were wholly lost to the plaintiff. The second *count stated, that [*168] the defendant, on &c., with force and arms, and against the peace of our lady the Queen, burnt, damaged, and destroyed divers other goods, chattels, and effects of the plaintiff, &c.

The defendant pleaded numerous pleas, of which the following only are material for the present questions:

First, Not guilty.

Second, to the first count, that the plaintiff was not lawfully possessed of the said slaves, goods, chattels, effects, &c., or of any or either of them, *modo et formâ*.

Fourth, to so much of the first count as relates to the seizing, taking, and carrying away the slaves therein mentioned, that, before the time of the committing of the supposed trespasses, to wit, on &c., a treaty was entered into and concluded between our

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late lord the King, William the Fourth, and the Queen Regent of Spain, during the minority of her daughter, Donna Isabella the Second, Queen of Spain, the said parties then having full power to enter into and conclude the said treaty on the part of this kingdom and the kingdom of Spain respectively; and that the said treaty was and is the treaty mentioned and set forth in an Act of Parliament passed in the Session of Parliament holden in the sixth and seventh years of the reign of his said late Majesty King William the Fourth, intituled "An Act for carrying into effect a treaty made between his Majesty and the Queen Regent of Spain, for the abolition of the slave trade," and was of the tenor and effect in the recital of the said Act set forth; and that afterwards, to wit, on &c., the said treaty was duly ratified, and the ratification thereof exchanged; and that the said treaty, from thence until and at the time when &c., continued, and was and still is in full force and effect, and a much longer time than two months, to wit, five years, from the time of ratifying and exchanging the ratifications of the
[*169] said treaty, had elapsed, and the said Act *of Parliament had been passed and in force, before the said time when &c. And the defendant says, that the plaintiff, at the time of the making and ratifying of the said treaty, and from thence until and at the time when &c., was a subject of and owed allegiance to the kingdom of Spain, and obedience to the laws of that kingdom, and that the slaves in the declaration mentioned were natives of Africa, born free, and reduced to slavery by force and duress, and that the plaintiff, after the said two months had elapsed, and the said Act had been passed, and before the said time when &c., to wit, on &c., and on divers days between that day and the said time when &c., though well knowing the premises, had procured, and at the said time when &c. was possessed of the said slaves, against their will, on the coast of Africa north of the Equator, for the purpose of carrying on the slave trade therewith, by transporting them from Africa, where, at the said time when &c., they were, and where the supposed trespasses were committed, to certain other places beyond the seas, to wit, the West Indies, to be there sold and used as slaves, contrary to the provisions of the said treaty and in violation thereof; and the plaintiff, at the said time when &c., was about to and would have caused the said slaves to be so transported, sold, and used as slaves, had not the defendant set them free, as hereinafter mentioned: whereupon the defendant, being a subject of this kingdom, and holding the rank of commander in the Royal

Navy thereof, and being a commander of a vessel of war, to wit, the *Wanderer*, in the naval service thereof, and duly authorised and instructed to carry into effect the provisions of the said treaty, in the manner therein provided, as the servant of her Majesty Queen Victoria, then and still being the Queen of this kingdom, and by her command, did, at the said time when &c., seize, take, and carry away the said slaves, for the purpose of setting them free, and preventing the plaintiff from acting as aforesaid, and violating the said treaty, and did then set them free, using *no unnecessary [*170] violence, and doing no more than was necessary for that purpose: *quæ sunt eadem*, &c. Verification.

Ninth, to the first count, except as to seizing the slaves, (after stating the treaty, and that the plaintiff was a subject of Spain, in the same terms as in the above plea), that the plaintiff, at the said time when &c., though well knowing the premises, was concerned and employed in carrying on, and did during and at that time carry on the said trade or traffic, contrary to the provisions of the said treaty and in violation thereof, at a certain place on the western coast of Africa north of the Equator, and that in the course of his carrying on the said trade or traffic, and for the purpose thereof, the plaintiff, before the said time when &c., to wit, on &c., and on divers days and times between that day and the said time when &c., had caused and procured the said goods, chattels, effects, &c. in the first count to be imported to the said place on the west coast of Africa, for the purpose and with the intent of using the same in carrying on the said trade or traffic, contrary to the provisions of the said treaty and in violation thereof, to wit, by the exchanging the said goods, chattels, effects, &c. respectively for human beings, and obtaining such human beings in exchange for the same respectively, and of thereupon transporting them, the said human beings so obtained, to certain other parts beyond the seas, to wit, the West Indies, to be there sold and used as slaves, contrary to the provisions of the said treaty and in violation thereof; and that the plaintiff, at the said time when &c., was possessed of the said goods, chattels, effects, &c. at the said place, for the sole purpose of being so used in carrying on the same trade or traffic, to wit, in manner aforesaid; and that the plaintiff was then about and intended to use, and would then have used, the said goods, chattels, effects, &c., in manner and for the purpose aforesaid, in carrying on the said trade or traffic, *contrary to the [*171] provisions of the said treaty and in violation thereof, had not the

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defendant seized, taken, and carried away the same, as hereinafter mentioned: whereupon the defendant, then being a subject of this kingdom, and holding the rank of commander in the Royal Navy thereof, and being the commander of a vessel of war, to wit, the *Wanderer*, in the naval service thereof, and duly authorised and instructed to carry into effect the provisions of the said treaty in the manner therein provided, in order to prevent the plaintiff from so using the said goods, chattels, effects, &c., and from violating the treaty aforesaid, and as servant of her Majesty Queen Victoria, then and still being the Queen of this kingdom, and by her command, did, to wit, at the said time when &c., seize, take, and carry away the said goods, chattels, effects, &c., using no more force and doing no more than was necessary for the purpose of preventing the plaintiff from so using the said goods, chattels, effects, &c., contrary to the said treaty, and in violation thereof: *quæ sunt eadem* &c. Verification.

Fourteenth, to the second count, that the goods, chattels, effects, &c. in that count mentioned were not the goods, chattels, &c. of the plaintiff, *modo et formâ*.

Sixteenth, to the second count, a similar plea to the ninth.

The plaintiff joined issue on the first, second, and fourteenth
[*172] pleas, and to the fourth replied (1), that, though true *it is that the said treaty was entered into and concluded as in that plea mentioned, and that the said treaty was so ratified and the ratifications

(1) The replications to the 4th, 9th, and 16th pleas were originally as follows: That, at the said time when &c., the said slaves were on land, and at the said place in the said pleas mentioned, being a certain place or country called Gallinas, and not parcel or within the dominions of the Queen of Great Britain or of the Queen of Spain, or subject to the laws, treaties, or regulations either of Great Britain or of Spain, to wit, on the continent of Africa, and were not, nor were nor was any or either of them, on board any ships or vessels, nor had the same, or any or either of them, been at any time met with or found by the defen-
[*172, *n*.] dant, or by *the said ship of war whereof he was such commander, or by any ship of war or cruiser of her Majesty the Queen of Great Britain or the Queen of Spain, upon or during any voyage, neither had any ship or vessel having the said slaves, or any or either of them, on board thereof, or intended to receive the same, or any or either of them, on board thereof, or from which the same, or any or either of them, had been disembarked, been met with or found by the defendant, or by the said ship of war whereof he was such commander, or by any ship of war or cruiser of her Majesty the Queen of Great Britain or of the Queen of Spain, upon or during any voyage, nor taken or detained, visited or searched, by the defendant or by any officer commanding any ship of either of their said Majesties, under the provisions of the said treaty. Verification.

To these replications the defendant demurred; and his point for argument was, that the replications admitted an

thereof so exchanged as therein mentioned, and that the said Act of Parliament was so passed as therein mentioned, and that the defendant was so holding such rank and was such commander, and duly authorised and instructed, as in that plea mentioned, to carry into effect the provisions of the said treaty in the manner in the said treaty provided, for replication nevertheless the plaintiff saith, that *the defendant, at the said time when &c., seized, took, and carried away the said slaves without the command of her Majesty Queen Victoria, and not by the command of her said Majesty, *modo et formâ*, concluding to the country. [*173]

There were similar replications to the ninth and sixteenth pleas.

M. D. Hill (1) opened the case on behalf of the plaintiff, and, after adverting to the statutes 58 Geo. III. sess. 1, c. 36, and 6 & 7 Will. IV. c. 6, relied upon the case of *Madrazo* v. *Willes* (2) as an express authority to show that a foreigner, who is not prohibited from carrying on the slave trade by the laws of his own country, may, in a British court of justice, recover damages sustained by him in respect of the wrongful seizure, by a British subject, of a cargo of slaves on board a ship then employed by him in carrying on the African slave trade.

The following facts were proved in evidence: The plaintiff was a Spaniard, who carried on the slave trade at the Gallinas, on the western coast of Africa, north of the Equator. He possessed barracoons or factories at Kamasura, Chicore, Dombocorro, Etaro, and other places in the Gallinas. The defendant held the rank of commander in the Royal Navy, and in March, 1840, had been placed, as senior officer, in charge of a part of the coast of Africa lying between Capes Verde and Palmas, with instructions to suppress the slave trade. Whilst so engaged, he received a letter dated the 30th of October, 1840, from Colonel Sir Richard Doherty, the then Governor of Sierra Leone, requesting him to take measures for the immediate liberation of a negro woman named Fry Norman,

intended violation of the treaty, which the defendant was justified in preventing.

Sir T. Wilde argued in support of the demurrers (5th June and 13th Nov., 1844). * * *

Sir F. Kelly argued for the plaintiff. * * *

The COURT suggested that the replications should be amended by traversing the command of the Queen, which was accordingly done.

(1) *M. D. Hill*, *Martin* and *F. Robinson*, for the plaintiff. The *Attorney-General*, *Godson*, *Cockburn*, and *Willes*, for the defendant.

(2) 22 R. R. 422 (3 B. & Ald. 353).

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and her child, British subjects belonging to Sierra Leone, who were detained *as slaves at the Gallinas by Prince Manna, the eldest son [*174] of King Siacca, the negro Sovereign of that country. This letter contained the following passage: "But should it be found impossible to effect this object without resorting to force, you will employ force as far as may be necessary, and as your orders and the rules of your service may permit. Should circumstances require it, I shall be prepared to assist you, to the extent of my ability, with a military party from this garrison, or in such other manner as may appear to you advisable." Accordingly, on the 19th of November, 1840, the defendant, having previously issued a "general order" respecting the expedition, entered the Gallinas river with the British vessels *Wanderer*, *Rolla*, and *Saracen*, and an armed force of about 120 men. Observing that the Spaniards were carrying off in their canoes a number of slaves, the defendant chased them, and succeeded in capturing about ninety, amongst whom were two British subjects, named John Fraser and John Parker. The defendant landed at Dombocorro, and, having taken possession of the plaintiff's barracoons, spiked the guns and placed sentinels at the doors. At this time the Government of the Gallinas consisted of King Siacca, his eldest son Prince Manna, and three chiefs of the name of Rogers. The defendant wrote to King Siacca, demanding the liberation of Fry Norman and her child, and complaining of the conduct of the Spaniards in carrying on the slave trade. Several letters having passed, the woman, Fry Norman, and her child were delivered up; and on the 21st of November, 1840, the following treaty was concluded and signed by the defendant, and Prince Manna on behalf of King Siacca (who was bedridden from old age), and the chiefs of the country:

"In consequence of the white slave-dealers settled in the river [*175] Gallinas having prevented the boats of her Britannic *Majesty's ships from receiving the common rights of humanity when in distress and seeking refuge in King Siacca's waters, in violation of his dignity and of his rights, thus exposing him to differences with the Queen of England; and also in consequence of a Sierra Leone boy having been made a slave of by these men at the river Gallinas, who was discovered and released by Commander Denman on the 19th inst.

"1st. King Siacca engages totally to destroy the factories belonging to these white men without delay.

"2nd. King Siacca engages to give up to Commander Denman all the slaves who were in the barracoons of the white slave-dealers when he entered the river, and have been carried off into the bush.

"3rd. King Siacca engages to send these bad white men out of his country by the first opportunity, and within one month from this date.

"4th. King Siacca binds himself in the most solemn manner that no white men shall ever for the future settle in his country for the purpose of slave trading.

"5th. Commander Denman, upon the part of her Britannic Majesty, promises never to molest any of the legitimate commerce of the Gallinas; but that, on the contrary, her ships shall afford every assistance to King Siacca's subjects, and take every opportunity of promoting his commerce.

"6th. The Governor of Sierra Leone will use his influence to get the Sierra Leone people to open the trade with King Siacca's country.

"7th. No white men from Sierra Leone shall settle down in King Siacca's country without his full permission and consent.

"8th. All complaints that King Siacca may have to make hereafter concerning any of her Majesty's ships, he is requested to forward at once to Sierra Leone; and a full investigation, and such redress as the occasion may require, *is solemnly promised by [*176] Commander Denman on the part of her Britannic Majesty.

"Done at Dombocorro, in the river Gallinas, this 21st day of November, 1840.

"PRINCE MANNA × (mark).
"LICOMI ROGERS × (mark).
"JOHN SILIPHI ROGERS × (mark).
"Signed, Jos. DENMAN, Commander and Senior Officer on the Sierra Leone station."

"On the 23rd of November, the defendant, in the execution of this treaty, commenced burning the plaintiff's barracoons. On one occasion, at the request of Prince Manna, the defendant with his own hand fired two rockets, which burnt the barracoons at Kamasura. The defendant also set fire to the village of Chicore, by which the plaintiff's barracoons in that place were destroyed. Before the expedition landed, there were about 300 slaves in these barracoons, besides great quantities of cotton and woollen goods, gunpowder, spirits, and goods of various descriptions adapted for

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slave traffic. On the approach of the expedition, the slave-dealers deserted the factories, and let loose the slaves, who were driven up the country. Great numbers of these slaves were afterwards taken by the defendant and carried to Sierra Leone, where they were emancipated. The goods were claimed by King Siacca, as forfeited in consequence of the owner having acted in defiance of his law, and were delivered up to him; the gunpowder was thrown into the river; and the casks of spirits were broken in, and the spirits allowed to flow away on the sand, it being suggested that they were poisoned. The defendant continued to fire the barracoons until the 26th, (that at Dombocorro being the last destroyed), when he re-embarked and proceeded to Sierra Leone, having succeeded in liberating 841 slaves. On the 28th the defendant wrote to the Governor of Sierra Leone a detailed account of these proceedings

[*177] at the Gallinas. *The Governor of Sierra Leone forwarded to Lord John Russell, then being her Majesty's principal Secretary of State for the Colonial Department, a despatch dated the 7th of December, 1840, inclosing the defendant's account of these proceedings. A report was also sent by the defendant to Captain Tucker, the senior officer of her Majesty's ships and vessels on the western coast of Africa, who forwarded the same to the Lords Commissioners of the Admiralty. On the 17th of March, 1841, the following letter, signed by the Under-Secretary of the Colonial Department, was sent, by the direction of Lord John Russell, to the Foreign Office, addressed to one of the Under-Secretaries, Viscount Palmerston then being her Majesty's principal Secretary of State for the Foreign Department:

"DOWNING STREET.

"SIR,—I am directed by Lord John Russell to transmit to you herewith, for the information of Viscount Palmerston, copies of two despatches, and of their inclosures, which have been received from the preceding and present Governors of Sierra Leone: the former reporting the proceedings of Commander the Honourable Joseph Denman, in the Gallinas, by which that officer has effected the recovery of two of her Majesty's subjects from captivity, the destruction of eight slave factories, and the liberation of 841 slaves: and the latter despatch reporting the circumstances under which a slave-dealer named Canot has surrendered himself and 104 slaves. I am to request, that, in laying these papers before Viscount Palmerston, you will state to his Lordship that Lord John Russell proposes to present them to Parliament, by command of her Majesty,

omitting only certain passages relating to Canot; and that, with his Lordship's concurrence, Lord John Russell further proposes to convey to the Governor of Sierra Leone his entire approbation of Colonel Doherty's conduct in urging the interposition of her Majesty's naval officers on behalf *of the woman and child who [*178] were detained in the Gallinas; and, secondly, to represent to the Lords Commissioners of the Admiralty, that her Majesty's Government entertain a high sense of the very spirited and able conduct of Commander Denman, and its important results to the interests of humanity. I am, Sir, &c.,

"J. BACKHOUSE, Esq. "JAMES STEPHEN."

On the 23rd March, 1841, Sir John Barrow, one of the Secretaries of the Admiralty, by command of the Lords Commissioners, transmitted to the Foreign Office a copy of the defendant's letter to the senior officer of her Majesty's ships on the western coast of Africa, to which the following reply was sent, signed by one of the Under-Secretaries of the Foreign Department:

"(Slave Trade.)

"FOREIGN OFFICE, April 6, 1841.

"SIR,—I am directed by Viscount Palmerston to acknowledge the receipt of your letter of the 23rd ult., inclosing a copy of a letter from Commander the Honourable Joseph Denman, reporting his proceedings on the coast of Africa in putting down the slave trade. I am to request that you will state to the Lords Commissioners of the Admiralty, that Lord Palmerston is of opinion that the conduct of Commander Denman, in his proceedings against the slave factories at the Gallinas, ought to be approved. And I am to add, that Lord Palmerston would recommend that similar operations should be executed against all the piratical slave trade establishments which may be met with on parts of the coast not belonging to any civilised Power. The course pursued by Captain Denman seems to be the best adapted for the attainment of the object in view; and the commanding officers of such of her Majesty's cruisers as may be employed in such duties should endeavour to obtain the formal permission of the native chiefs for the destruction *of the slave factories [*179] within their territories, leaving to those chiefs all the merchandize which may be stored up in those factories, the British officers contenting themselves with destroying the factories, and conveying to Sierra Leone any slaves that may be found in them. I am, &c.,

"J. BACKHOUSE."

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On the 7th April, 1841, the following letter was sent from the Colonial Office to the Admiralty, addressed to one of the Under-Secretaries:

"DOWNING STREET.

"SIR,—I am directed by Lord John Russell to transmit to you herewith inclosed copies of one despatch, and of its inclosures, and an extract of another despatch, with copy of its inclosure, which have been received from the preceding and present Governors of Sierra Leone, reporting the proceedings of Commander the Honourable Joseph Denman at the Gallinas, by which that officer has effected the recovery of two of her Majesty's subjects, the destruction of eight slave factories, and the liberation of 841 slaves; and I am to request that you will lay these papers before the Lords Commissioners, and move their Lordships to express to Commander Denman the high sense which her Majesty's Government entertain of his very spirited and able conduct at the Gallinas, and of its important results to the interests of humanity.

"I am further directed to request that you will move the Lords Commissioners to instruct the officers commanding her Majesty's ships and vessels on the western coast of Africa, that it is the opinion of her Majesty's Government, that operations similar to those undertaken by Commander Denman at the Gallinas should be executed against all the piratical slave trade establishments which may be met with on parts of the coast not belonging to any civilised Power. I am, &c.,

"JAMES STEPHEN.

"R. MORE O'FERRALL, Esq., M.P."

[180] On the 28th July, 1841, the following letter was sent from the Foreign Office to the Admiralty, addressed to one of the Under-Secretaries:

"SIR,—I am directed by Viscount Palmerston to acknowledge the receipt of your letter of the 14th instant, transmitting copy of Commander Denman's report of his proceedings at the Gallinas in November last.

"I am to request that you will state to the Lords Commissioners of the Admiralty, that Lord Palmerston is of opinion that the proceedings of Commander Denman on the occasion in question were highly meritorious, and that it is extremely desirable that a similar course should be pursued in other places along the coast of Africa, not being possessions of any European Power, at which slave trade factories have been established.

"Lord Palmerston conceives there can be little doubt, that, in all such cases, an agreement might be made with the native chiefs similar to that which was made by Commander Denman with the Gallinas chiefs; but if such an agreement should in any case be found impossible, the commanders of her Majesty's cruisers would be perfectly justified in considering European slave traders established in the territory of the native chiefs as persons engaged in a piratical undertaking; and the British commander would be warranted in landing and destroying the barracoons, and the goods contained in them, and in liberating and carrying off to Sierra Leone the slaves whom they might find therein.

"Lord Palmerston is of opinion, however, that it would be necessary, in such cases, that full and complete proof should be recorded that the buildings and property destroyed were employed for slave trade, in order that her Majesty's Government might be able to give an indisputable answer to any application which might at any time be made on behalf of the slave traders, upon the false pretence that they were men engaged in legal commerce.

"I am, &c., "LEVESON."

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The above letters were referred to in the margin as annexes to the following letter from Lord Aberdeen, then Secretary of State for Foreign Affairs, to the Lords of the Admiralty, and were read, together with that letter, as part of the plaintiff's evidence:

"FOREIGN OFFICE, May 20, 1842.

"MY LORDS,—I beg to call your attention to the subject of the instructions given to her Majesty's naval officers employed in suppressing slave trade on the coast of Africa, and to the proceedings which have taken place with reference thereto, as detailed in the papers named in the margin of this letter. Her Majesty's *Advocate-General*, to whom these papers have been submitted, has reported that he cannot take upon himself to advise that all the proceedings described as having taken place at Gallinas, New Cestos, and Sea Bar, are strictly justifiable, or that the instructions of her Majesty's naval officers, as referred to in these papers, are such as can with perfect legality be carried into execution. The *Queen's Advocate* is of opinion, that the blockading rivers, landing and destroying buildings, and carrying off persons held in slavery in countries with which Great Britain is not at war, cannot be considered as sanctioned by the law of nations or by the provisions of any existing treaties; and that, however desirable it may be to put an end to the

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slave trade, a good, however eminent, should not be obtained otherwise than by lawful means. Accordingly, and with reference to the proceedings of Capt. Nurse at Rio Pengas, on the 28th April, 1841, as well as to letters addressed from this department to the Admiralty on the 6th April, the 1st and 17th June, and the 28th of July of last year, I would submit to the consideration of your Lordships, that it is desirable that her Majesty's naval officers employed in suppressing the slave trade should be instructed to abstain from destroying slave factories and carrying off persons held in slavery, unless the Power, upon *whose territory or within whose jurisdiction the factories or the slaves are found, should, by treaty with Great Britain or by formal written agreement with British officers, have employed her Majesty's naval forces to take these steps for the suppression of the slave trade; and that if, in proceeding to destroy any factory, it should be found to contain merchandise or other property which there may be reason to suppose to belong to foreign traders, care should be taken not to include such property in the destruction of the factory. With respect to that, the terms 'blockade' and 'blockading' have been used by British naval officers when adverting to the laudable practice of stationing cruisers off the slave-factory stations, with a view the better to intercept vessels carrying on slave trade, contrary to treaties between Great Britain and the Powers to which such vessels belong; but as the term 'blockade,' properly used, extends to an interdiction of all trade, and indeed all communication, with the place blockaded, I beg leave to submit for your Lordships' consideration whether it will not be proper to caution her Majesty's naval officers upon this head, lest, by the inadvertent and repeated use of the term 'blockade,' the exercise of the duty confided to British officers in suppressing slave trade might by any one be confounded with the very different one of actual blockade. "I have, &c.,

"ABERDEEN."

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The correspondence relating to these proceedings was laid before Parliament, and by the 10 & 11 Vict. c. 107, a sum of 7,500*l.* was appropriated for the suppression of the slave trade on the coast of Africa, 4,000*l.* of which was voted to the defendant and his men for their services at the Gallinas. The present action was commenced in the year 1842.

The *Attorney-General:*

With respect to the plea denying the plaintiff's property in the

slaves, it is submitted *that the plaintiff is bound to prove his right. It is true, that, by the municipal law, persons may have a property in slaves; but every one being of natural right free, the *onus* of showing such a property is cast on the party who claims it. This subject is fully discussed by Chancellor Kent in his Commentaries (1), where, after adverting, amongst other cases, to that of *The Antelope* (2), decided in the Supreme Court of the United States in the year 1825, he thus states the result: "The doctrine in the case of *The Antelope* and in the English cases therein referred to, is, that a right of bringing in for adjudication in time of peace foreign vessels engaged in the slave trade and captured on the high seas for that cause, did not exist; and vessels so captured would be restored, unless the trade was also unlawful and prohibited by the country to which the vessel belonged; and if a claim be put in for Africans as slaves and property, the *onus probandi* is thrown upon the claimant to make specific proof of the individual proprietary interest, according to the laws of the country to which the vessel belongs." At one time, indeed, it was supposed that the slave trade was piratical and illegal by the common law of nations; that doctrine, however, was qualified in the case of *Le Louis* (3). The decision in *Madrazo* v. *Willes* (4), which is relied upon by the plaintiff, turned on the words of the treaty of 1817, by which Spain declared the slave trade illegal, but at the same time reserved to herself the right of trafficking in slaves within her own dominions. That is provided against by the treaty of the 28th June, 1835, embodied in the 6 & 7 Will. IV. c. 6; by the first article of which "the slave trade is again declared on the part of Spain to be thenceforward totally and finally abolished in all parts of the world." By Article II., "her Majesty the Queen-Regent *of Spain, during the minority of her daughter, Donna Isabella the Second, engages that, immediately after the exchange of the ratifications of the present treaty, and from time to time afterwards as it may become needful, her Majesty will take the most effectual measures for preventing the subjects of her Catholic Majesty from being concerned, and her flag from being used, in carrying on in any way the trade in slaves; and especially that, within two months after the said exchange, she will promulgate throughout the dominions of her Catholic Majesty a penal law, inflicting a severe punishment on all those her Catholic Majesty's subjects who shall, under any pretext whatsoever, take

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(1) Vol. 1, pp. 191, 200, 4th ed.
(2) 10 Wheaton Rep. U. S. 66.
(3) 2 Dod. 210.
(4) 22 R. R. 422 (3 B. & Ald. 353).

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any part whatever in the traffic in slaves." It is said that the defendant must prove an act of State carrying out the treaty; but that is not necessary. If the Crown, acting on behalf of the people, makes a treaty, no subject has a right to bring an action for anything done in pursuance of that treaty, whether sanctioned by the municipal law or not; for his assent is virtually implied to every act of his own Government: *Conway* v. *Gray* (1).

Secondly. The documents adduced in evidence prove the issues raised on the fourth, ninth, and sixteenth pleas. On the 6th and 7th of April and 28th of July, 1841, two of the principal Secretaries of State expressed their approval of the defendant's conduct; and, as the Crown can do no act except through its responsible advisers, their approval is equivalent to the Queen's command. It is not necessary that the command should be antecedent to the act done. In the case of *The Rolla* (2), where an American ship and cargo were proceeded against for a breach of the blockade of Monte Video imposed by the British commander Sir Home Popham, without any communication with his Government, Lord STOWELL, [*185] in delivering judgment, says: "However irregularly he may have acted towards his own Government, the subsequent conduct of Government, in adopting that enterprise, by directing a further extension of that conquest, will have the effect of legitimating the acts done by him, so far at least as the subjects of other countries are concerned." In Best on Presumptions of Law and Fact (3), it is stated to be "a fixed principle, that every ratification has relation back to the time of the act done—*Omnis ratihabitio retrotrahitur et mandato æquiparatur.*" Many authorities to the same effect are collected in a note to the case of *Potter* v. *North* (4), where, treating of the authority of a bailiff to distrain, it is said: "It is sufficient for the defendant in his cognizance to say generally 'as bailiff of J. S.,' without showing his authority; and a subsequent agreement by J. S. to the distress amounts to an authority, as much as if he had previously directed the defendant to distrain: Bro. Traverse, 3; 4 Mod. 378, *Lamb* v. *Mills;* 11 Mod. 112, *Trevillian* v. *Pine.* Therefore, if he makes cognizance as bailiff to the King, he need not allege a patent: Bro. Bailiff, 2; or to a corporation, he need not allege a deed, or say it was by their command: 3 Lev. 107, *Manby* v. *Long.*" The effect of this ratification by the Crown was to render

(1) 15 R. R. 615, *n.* (10 East, 536).
(2) 6 Rob. 364.
(3) Page 28.
(4) 1 Saund. 347 c.

the defendant's act an act of State, in respect of which no action can be maintained: *Elphinstone* v. *Bedreechund* (1).

M. D. Hill:

Assuming that there was a ratification, it will not support the issues raised on the Queen's command. The principle on which the "*ratihabitio*" has proceeded is, that it is part of the law of principal and agent, and it has never been used for the protection or justification of the agent, but where the act done is founded on a right existing in the principal, and not in the agent except as *authorised [*186] by the principal. The fiction which carries back the ratification, and gives it the force and operation of a prior command, is, like other legal fictions, in favour of justice. The question between the parties is not whether the agent had a right to do the act, but whether it ought to have been done at all; and, therefore, if the principal had a right to do it, the agent is empowered to vouch his subsequent ratification. That principle is now attempted to be used in a manner which neither reason, justice, nor analogy drawn from authority can justify. It is not for the purpose of showing that the act was justifiable, but for the purpose of protecting the party committing it against examination as to whether it was right or wrong. It is said that this is an act of State, for which the Crown is alone responsible, and not a matter to be tried by the municipal law. But there has been no publication of the act in the *Gazette*, by which the Queen of Spain could be informed of the proper mode of seeking redress for this injury to one of her subjects.

Secondly. There has been no ratification. It does not appear that the letters of the Secretaries of State were written by authority under the Great Seal, which is necessary to render the Crown responsible for an act like the present, which gives a *casus belli* to the Queen of Spain. Indeed, it does not appear that the matter was in any way submitted to the Queen. The Court will not presume a ratification, the effect of which would be to make the Crown responsible for a violation of the law of nations towards a friendly Power.

PARKE, B., (in summing up):

With respect to the issue, whether the plaintiff was possessed of these slaves, your verdict must be for the plaintiff. The law on the subject of slaves has been settled by the case of *Le Louis* (2), which

(1) 1 Knapp, 316. (2) 2 Dod. 210.

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has been referred to. That case was decided, in the *year 1817, by Sir WILLIAM SCOTT, who went fully into the question of the legality of the slave trade, and laid down certain positions, which have since been acquiesced in both in this country and abroad. Those positions are, first, that dealers in slaves are not pirates by the law of nations, and can only be made so by and according to the terms of a treaty with the country to which they belong prohibiting the slave trade; secondly, that trading in slaves is not a crime by the law of nations; thirdly, that the right of stopping and searching ships in time of peace is not a right which can belong to any nation except by contract with the nation to which such ships belong; and, fourthly, that if there be a law in a particular country prohibiting the slave trade, it is not open to every one to punish the offender against that law, but proceedings must be taken in the tribunals of his own country. Those propositions being clear, a question arises, whether the plaintiff can maintain this action for taking away his slaves. It is not necessary to decide whether, if he had been simply in the actual possession of slaves, using them as slaves, he could have recovered against any person who took them away: on that point it is not necessary to give an opinion, because, according to the evidence on both sides, he was living at Gallinas, where it was lawful to possess slaves. It is contended that, by the law of Spain, the plaintiff cannot possess a property in slaves for the purpose of exporting them, as slaves, to the West Indies. However, there is no evidence of such law, and we are all, therefore, of opinion that the second and fourteenth issues, both as to the slaves and the goods, must be found for the plaintiff.

The principal question is, whether the conduct of the defendant, in carrying away the slaves, and committing the other alleged trespasses, can be justified as an act of State, done by authority of the Crown. It is not contended that there was any previous authority. If the defendant had merely instructions according to

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the terms of the treaty set *out in the Act of Parliament, those instructions would only have extended to the stopping of ships in the high seas, within the limits agreed to by the treaty with the Spanish Crown. Therefore, the justification of the defendant depends upon the subsequent ratification of his acts. A well-known maxim of the law between private individuals is, "*Omnis ratihabitio retrotrahitur et mandato æquiparatur.*" If, for instance, a bailiff distrains goods, he may justify the act either by a previous or subsequent authority from the landlord; for, if an act be done by

a person as agent, it is in general immaterial whether the authority be given prior or subsequent to the act. If the bailiff so authorised be a trespasser, the person whose goods are seized has his remedy against the principal. Therefore, generally speaking, between subject and subject, a subsequent ratification of an act done as agent is equal to a prior authority. That, however, is not universally true. In the case of a tenant from year to year, who has, by law, a right to a half-year's notice to quit, if such notice be given by an agent, without the authority of the landlord, the tenant is not bound by it. Such being the law between private individuals, the question is, whether the act of the Sovereign, ratifying the act of one of his officers, can be distinguished. On that subject I have conferred with my learned brethren, and they are decidedly of opinion that the ratification of the Crown, communicated as it has been in the present case, is equivalent to a prior command. I do not say that I dissent; but I express my concurrence in their opinion with some doubt, because, on reflection, there appears to me a considerable distinction between the present case and the ordinary case of ratification by subsequent authority between private individuals. If an individual ratifies an act done on his behalf, the nature of the act remains unchanged, it is still a mere trespass, and the party injured has his option to sue either; if the Crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the double option *of bringing his action against the agent who committed the trespass [*189] or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass. Whether the remedy against the Crown is to be pursued by petition of right, or whether the injury is an act of State without remedy, except by appeal to the justice of the State which inflicts it, or by application of the individual suffering to the Government of his country, to insist upon compensation from the Government of this—in either view, the wrong is no longer actionable. I do not feel so strong upon the point as to say that I dissent from the opinion of my learned brethren; therefore, you have to take it as the direction of the Court, that if the Crown, with knowledge of what has been done, ratified the defendant's act by the Secretaries of State or the Lords of the Admiralty, this action cannot be maintained. In the documents which have been read there is ample evidence of ratification, for the Secretary of State for Foreign Affairs, the Lords of the

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Admiralty, and the Secretary of State for the Colonial Department, on receiving the report of the Governor of Sierra Leone, and the account of the transactions given by the defendant himself, expressed their approbation of what he had done. The acts, indeed, have never been published, and that is one of the circumstances which created a doubt in my mind. But, although the ratification was not known before this action was commenced, that fact makes no difference in the opinion of the Court. A previous command would be unknown, if given verbally; and a subsequent ratification, though unknown, will have the same effect.

It is argued, on the part of the plaintiff, that the Crown can only speak by an authentic instrument under the Great Seal, and that, therefore, the ratification ought to have been under the Great Seal. We are clearly of opinion, that, as the original act would have been an act of the Crown, if communicated by a written or parol direction [*190] from the *Board of Admiralty, so this ratification, communicated in the way it has been, is equally good. I should observe that the Court are of opinion that it is not necessary for the defendant to prove the pleas which expressly state the authority of the Crown: for if this act, by adoption, becomes the act of the Crown, the seizure of the slaves and goods by the defendant is a seizure by the Crown, and an act of State for which the defendant is irresponsible, and, therefore, entitled to a verdict on the plea of "Not guilty."

The jury found that the Crown had ratified the act of the defendant, with full knowledge of what he had done, whereupon a verdict was taken for him on the 4th, 9th, and 16th pleas. A verdict was found for the plaintiff on the pleas of not possessed of the slaves and goods: and the plea of "Not guilty" was entered, by consent, for the plaintiff.

F. Robinson tendered a bill of exceptions to the above ruling; but the plaintiff afterwards obtained an order to discontinue, certain terms of settlement of this and other similar actions having been agreed to.

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(2 Ex. 191—196.)

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The date a letter bears is *primâ facie* its true date.

ASSUMPSIT. The first count of the declaration was on a bill of exchange for 250*l.*, of the 28th of August, 1846, payable four months after date, drawn by one Gardener upon and accepted by the defendant, indorsed by Gardener to one Gadderer, and by him indorsed to the plaintiff. Plea (amongst others), in substance, that the bill was drawn and accepted for a special purpose, viz. that the drawer would get it discounted, and pay the proceeds to the defendant; that from the time of such acceptance, until it was indorsed to Gadderer, Gardener held it on those terms, and that the defendant never received any consideration for it; that Gardener did not get it discounted, but indorsed it without the defendant's consent to Gadderer, who, before and at the time of such indorsement, knew that the bill was held for the special purpose aforesaid; that the plaintiff had notice of the premises before it was indorsed to her, and that neither had Gadderer or the plaintiff, before such notice, any right or title to have the bill indorsed to them. Verification. There was also a plea, that the defendant's acceptance was obtained by fraud and covin, &c., of which both Gadderer and the plaintiff had notice before they acquired any title to the bill. Verification. The plaintiff *replied [*192] *de injuriâ* to these pleas, upon which issue was joined. At the trial of the cause, before Pollock, C. B., at the Middlesex sittings after Trinity Term, 1847, it appeared that the defendant had been induced to accept the bill in question on the faith of an advertisement in the newspapers, which offered loans of money upon favourable terms, and upon the understanding that the bill would be discounted, and that he should receive the proceeds. He did not, however, ever receive any money on account of the bill. It was proposed on the part of the defendant to read certain letters from Gadderer to the defendant, to show that whilst the bills were in Gadderer's hands, and before they were indorsed to him, he knew the terms upon which the defendant had accepted the bill. It was thereupon objected on the part of the plaintiff, that there was nothing to show the time when these letters were written; that the dates of the letters could not be taken as any evidence of that fact, unless the letters could be connected with the envelopes

(1) Followed in *Malpas* v. *Clements*, (1850) 19 L. J. Q. B. 435.—J. G. P.

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in which it was contended they had been sent, and which bore a postmark; and that they were not admissible as against the plaintiff, who was a stranger. The LORD CHIEF BARON rejected the letters. The plaintiff obtained a verdict for a portion of the demand.

Cockburn having obtained a rule *nisi* for a new trial, on the ground that these letters were improperly rejected,

Montagu Chambers, *Miller*, and *G. Pollock* now showed cause:

The letters in question were properly rejected, as there was no evidence of the time when they were written. If they were written after the bill was indorsed, they would be immaterial. If the defendant relied upon the dates, the letters should have been in some way connected with envelopes which bore a postmark, or the party who wrote them should have been called to prove the time when they were written.

(PARKE, B.: There is a case which shows that the date of a letter
[*193] is *primâ facie* evidence of the time it was *written. He referred to *Anderson* v. *Weston* (1).)

The rule there laid down cannot be taken to extend to cases of letters written by strangers, and not by the parties to the suit. In the case of a promissory note, signed by a bankrupt before the bankruptcy, it has been held that the note is not sufficient *per se* to support the commission, but that it must be proved to have been in existence before the bankruptcy.

(PARKE, B., referred to *Wright* v. *Lainson* (2); *Smith* v. *Battens* (3).)

As against the parties in the suit the rule appears to be reasonable; but it would be a dangerous doctrine to hold that those parties are to be affected by the date of a letter written by a stranger. * * *

Cockburn and *Humfrey*, in support of the rule:

These letters were clearly admissible. The cases of *Sinclair* v. *Baggaley* (4), and *Anderson* v. *Weston*, are the solemn and express
[*194] decisions of two Courts upon this identical point, *viz. that the date of an instrument is *primâ facie* evidence of the time when it was written. The same point was ruled in *Smith* v. *Battens* (3).

(1) 6 Bing. N. C. 300; 8 Scott, 583.
(2) 2 M. & W. 739.
(3) 1 Moo. & Rob. 341.
(4) 51 R. R. 601 (4 M. & W. 312).

(PARKE, B., referred to *Edwards* v. *Crock* (1).)

This Court, being one of co-ordinate jurisdiction only, is bound by these two decisions: *Wagstaff* v. *Sharpe* (2). A deed of thirty years old proves itself.

(POLLOCK, C. B.: The principle there rests upon the antiquity of the instrument, as taken with its proper custody. He referred to *The Bishop of Meath* v. *Marquis of Winchester* (3).)

If the dates of these letters are to be considered as *primâ facie* evidence of the time when they were written, they were clearly admissible in order to support an allegation in the pleas, viz., that Gadderer had notice of the terms upon which the bill was accepted. If he had such notice, he had no title to the bill.

(PARKE, B.: It is proof positive, if contemporaneous with the indorsement.)

POLLOCK, C. B.:

I am of opinion that this rule ought to be made absolute. With deference to the authorities which have been cited on the part of the defendant, I am forced to the conclusion that these letters ought not to have been rejected, on the ground that the dates they bore were not *primâ facie* evidence of the time when they were written. The use of envelopes is now very generally adopted, and to misdate a letter would certainly be something in the nature of a fraud.

PARKE, B.:

I agree that this rule ought to be made absolute. The letters were clearly relevant to a material allegation in the plea, namely, that Gadderer had notice of the terms of the acceptance. As to the question with regard to the dates, it is a difficult matter to support those cases of *Sinclair* v. *Baggaley* and *Weston* v. *Anderson* to their full extent, and yet at the same time it is an equally difficult matter not to be bound by them. It has certainly been held by the *Court of Common Pleas to be a settled matter, but [*195] that there is an exception with respect to the date of a bill of exchange or promissory note, produced for the purpose of proving a petitioning creditor's debt, to support a *fiat* in bankruptcy. If

(1) 4 Esp. 39.
(2) 3 M. & W. 525.
(3) 42 R. R. 38 (3 Bing. N. C. 183; 3 Scott, 561).

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that be so, I feel great difficulty in seeing the reason of that exception. We, however, feel ourselves bound by those decisions which have been cited. The present question, therefore, must be decided by another tribunal, and the proper course will be to raise it by a bill of exceptions. In the case of *Davies* v. *Lowndes* (1), Lord DENMAN, Ch. J., in delivering the judgment of the court of error, says, "It was objected, however, on the part of the defendant in error, that, supposing the pedigree or some part of it to be otherwise admissible, it was rendered inadmissible by having been written or assented to *post litem motam*. To this it was answered that the instrument was dated by William Lloyd, in 1733, and that this could not be a *lis mota* before September, 1772, when the testator died; that an instrument must be presumed *primâ facie* to have been written when it bears date; for which the cases of *Anderson* v. *Weston*, and *Smith* v. *Battens*, were cited as authorities; at all events, that such was the rule with respect to instruments dated thirty years or upwards, the custody of which was accounted for. The latter argument appears to be well founded; and as this document falls within that description, we think it clear that the objection of *lis mota* does not apply to it, so far as it rests upon the admission of William Lloyd." That Court therefore did not rest the case upon the doctrine laid down by the Common Pleas, but on the other ground, viz. that the deed was more than thirty years old, and had come from the proper custody.

ROLFE, B.:

I am of the same opinion. I wish to make one observation only, which is, that the rule respecting the date of a deed which is thirty years old stands upon a *different footing. Inasmuch as in the nature of human affairs it would of necessity be impossible in many cases to prove the date of an instrument of that age, it therefore became necessary for the security of mankind to draw a line. The time might be for only twenty-five years, or for more than thirty; but being thereabout, for that reason the line was drawn.

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PLATT, B., concurred.

Rule absolute (2).

(1) 64 R. R. 783 (7 Scott, N. R. 213).

(2) *Lewis* v. *Simpson*, T. T., 1848, (June 1). In this case the same question arose. The COURT said that they held themselves bound by the preceding case, and the rule for a new trial, on the ground that certain

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(2 Ex. 198—200; S. C. 17 L. J. Ex. 225; 12 Jur. 338.)

One of the co-sureties of a bond received from his principal a promissory note to the amount of that instrument: Held, that it was a question for the jury to say *quo animo* the note was given, and whether it was given in pursuance of an arrangement that the defendant should be thereby discharged, or merely by way of collateral security, in which latter case the defendant would be liable for contribution on payment of the bond by his co-surety.

ASSUMPSIT for money paid, and on an account stated. Pleas, first, as to 22*l.* 15*s.*, parcel &c., payment of that sum into court; and secondly, as to the residue, *Non assumpsit.*

At the trial of the cause, before Erle, J., at the last Assizes for the County of Chester, it appeared that the action was brought to recover contribution for a sum of money paid upon a bond conditioned for the payment of 250*l.*, which had been executed by one Dodd as principal, and by the plaintiff and defendant as his co-sureties. Previous to the execution of the bond, Dodd had borrowed a sum of money from a third party, for which he had given a promissory note for 200*l.* by way of security, as principal, with the plaintiff as his surety. Upon the arrival of this note at maturity, the payee applied for payment; and in order to meet the demand, the loan of 250*l.* was requested, and that sum was agreed to be lent to Dodd by the obligee of the bond, on condition that the plaintiff and defendant would enter into another bond as sureties for Dodd. Before the plaintiff would execute the bond, she insisted upon the promissory note being delivered up, and that a fresh note for 250*l.* should be given to her by Dodd. This was done, and she thereupon executed the bond; but there was no evidence that the defendant was aware of this part of the transaction. It was contended, on the part of the defendant, that the present action would not lie. The learned Judge left it to the jury to say whether the plaintiff and defendant were co-sureties for Dodd; and he told them, that if they should be of that opinion, the plaintiff would be entitled to recover. The plaintiff obtained a verdict.

letters were improperly rejected, was made absolute.

Angell v. *Worsley*, H. T., 1849, Jan. 25). In this case also the same point was discussed, when the COURT stated that they felt themselves bound by the two preceding cases, but that they entertained strong doubts upon the matter. The LORD CHIEF BARON said that he had invited a bill of exceptions when the objection was raised to the admission of the letters at the trial; and the COURT discharged the rule for a new trial.

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Evans now moved for a new trial, on the ground of misdirection:

[*199] In the present case the plaintiff was herself the *principal in the transaction, as she received a promissory note from Dodd; and as that fact was unknown to the defendant, it would be unjust that she should have this remedy, in addition to that which the note enables her to adopt. These parties do not stand in the relation of co-sureties, and the learned Judge should not have so directed the jury. This action is purely an equitable one. [He referred to *Cowell* v. *Edwards* (1) and the notes to *Lampleigh* v. *Brathwait*, in Smith's Leading Cases (2).]

(ROLFE, B.: It was surely a question of fact for the jury to say upon what terms the defendant signed the bond. *Primâ facie* the defendant is liable to the plaintiff for contribution, as they are co-sureties for the loan made to Dodd.)

It would be unjust that the plaintiff should have her remedy on the promissory note against Dodd, and also in this action against the defendant.

POLLOCK, C. B.:

There ought to be no rule. It appears to me that the direction of the learned Judge at the trial was quite correct. The circumstances of this case are shortly these: A promissory note for 200*l.* had been given by Dodd, and a sum was offered to be advanced to
[*200] him *upon the plaintiff and defendant entering into a bond as co-sureties. The plaintiff, before executing that instrument, insisted upon having a note for 250*l.* given to her. The simple question is, whether the note for 250*l.* was given by Dodd to the plaintiff as a mere collateral security for the payment of the money on the bond, or whether there was such an arrangement as to extinguish the defendant's liability as co-surety. That was a question of fact for the jury, and was, I think, properly left to them.

PARKE, B.:

I am of the same opinion. The only question is, *quo animo* the promissory note was given. If it could be supposed that there was an arrangement between the several parties, by which it was agreed that the note should be given to extinguish the defendant's

(1) 2 Bos. & P. 268.

(2) Vol. 1, p. 71. [*See* 11th ed., vol. 1, p. 141.]

liability as co-surety, so that the plaintiff was only to look to Dodd and not to the defendant at all, the learned counsel for the defendant should have had that question left to the jury. But it seems to me that the real motive in taking the note was that Dodd should repay the plaintiff, or, in other words, it was taken as a collateral security for repayment, if she should be called upon to pay the amount of the bond; and I do not think that the question with respect to the defendant is in the least degree affected by that transaction.

ROLFE, B., and PLATT, B., concurred.

Rule refused.

NICHOLSON *v.* BROOKE AND OTHERS.

1848. *May* 10.

(2 Ex. 213—214; S. C. 17 L. J. Ex. 229.)

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Where several defendants appear by several counsel, it is a matter for the discretion of the presiding Judge whether he will allow more than one counsel to be heard. *Semble*, that, where one defence alone is relied on, the better rule is, that one counsel only ought to be heard.

DEBT for wages and salary due to the plaintiff, as the secretary and servant of the defendants. Plea, by all the defendants, except as to 23*l.*, never indebted; and as to that sum, payment thereof into Court. The defendants all appeared by the same attorney.

At the trial, before Parke, B., at the London sittings in the present Term, it appeared that the plaintiff acted as the secretary to the Company of which the defendants were all members, and the only question was, whether all the defendants were parties to the contract. After the counsel for one of the defendants had addressed the jury, *Lush* applied to be also heard for the other defendant Brooke, but was refused by the learned Judge. The plaintiff obtained a verdict.

Lush now moved for a new trial:

The learned Judge ought to have allowed counsel to address the jury for the defendant Brooke. If there had been separate pleas put upon the record, he would have been entitled to that right; and the fact that there is only one plea which is adopted in practice, can make no difference in that respect.. (He referred to *King* v. *Williamson* (1), *Massey* v. *Goyder* (2), *Ridgway* v. *Philip* (3).)

(1) 3 Stark. 162.
(2) 34 R. R. 782 (4 Car. & P. 162).
(3) 40 R. R. 623 (1 Cr. M & R. 415).

NICHOLSON v. BROOKE. [*214]

(PARKE, B.: There was only one *defence substantially set up in the present case, for if the plaintiff had failed to show that one defendant was a party to the contract, he would have failed as to all; and for that reason I refused the application.

POLLOCK, C. B.: In *Chippendale* v. *Masson* (1), Lord Chief Justice GIBBS said—"The interest of the defendants being the same, I can only hear one counsel. This is a rule I received from a Judge of whom no one can speak without respect, and almost reverence; I mean my very learned and excellent predecessor, Chief Justice MANSFIELD. By this rule I will abide."

ROLFE, B.: The cases show that it is a mere matter for the discretion of the Judge at the trial.)

POLLOCK, C. B.:

There will be no rule. It is a matter purely for the discretion of the Judge at Nisi Prius, whether he will allow one or more counsel to address the jury on the part of the defendants. If there are a number of defendants whose interests are precisely the same, and only one point of defence is raised, he exercises a proper discretion by allowing only one counsel to address the jury.

PARKE, B., ROLFE, B., and PLATT, B., concurred.

Rule refused.

1848. *May* 10

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REG. *v.* RENTON.

(2 Ex. 216—223; S. C. 17 L. J. Ex. 204; 5 Dowl. & L. 750.)

A party in custody under a writ of extent, at the suit of the Crown, was allowed voluntarily to escape, but was retaken and restored into the same custody, and under the same writ: Held, that he was rightly in custody, and was not entitled to his discharge.

LUSH had obtained a rule, calling upon the *Attorney-General*, or the Commissioners of Excise, and the Sheriff of the county of Surrey, to show cause why the writ of extent issued against the defendant should not be quashed, and the defendant discharged out of the custody of the sheriff. It appeared from the affidavits, that the defendant was taken in custody upon the 31st of January, [*217] under a writ of extent *issued at the suit of the Crown, for certain penalties incurred by him for having violated the excise laws. The writ was made returnable in vacation. The defendant had

(1) 4 Camp. 174. See 34 R. R. 772, *n.*

been removed from prison on the 12th of February, by an order of the Commissioners of Excise, for the purpose of giving evidence upon matters with respect to the writ of extent. He was afterwards taken back to the same custody. The above rule was obtained upon two grounds: the first was, that the writ was void, as the return-day was in vacation; and secondly, that the fact of the defendant having been removed from gaol without a *habeas corpus ad testificandum* operated as an escape, and that he was entitled to his discharge.

The *Attorney-General* now showed cause:

The first point upon which this rule was obtained is settled by the 8th section of stat. 5 & 6 Vict. c. 86, which authorises the return of writs of extent to be made in vacation (1). As to the main point in the case (which is an important one), it may be admitted that, as between subject and subject, if a party is brought up out of gaol without a *habeas corpus*, it is a voluntary escape, and he cannot be retaken. But this rule only applies as between subject and subject, and not as between a subject and the Crown.

(POLLOCK, C. B.: The Crown is not affected by the *laches* of its officers.)

It was so said in *Sheffield* v. *Ratcliffe* (2). The same rule is laid down in *The Attorney-General* v. *Chitty* (3), which was approved of in the more recent case of *The Attorney-General* v. *Walmsley* (4). The case of *The Attorney-General* v. *Ansted* (5) is founded upon the same principle, which, in truth, disposes of the present question. But an *Anonymous* case in Savile (6), which is translated in West on Extents (7), is precisely in point. There, "It was said *by [*218] Fanshawe, the Queen's remembrancer, that if one be in execution at the suit of the Queen, in the Fleet, the Warden of the Fleet may suffer him to go to his counsel with his keeper; but it is otherwise if he be in execution at the suit of a common person. And the reason is this, that if he that is in execution for the Queen happen to escape, the Warden for the Queen may retake him; but it is otherwise in the case of a common person: *quod tota curia*

(1) See the Judicature Act, 1873 (36 & 37 Vict. c. 66), ss. 26 and 28.—J. G. P.
(2) Hob. 347.
(3) Parker, 48.
(4) 12 M. & W. 179.
(5) 12 M. & W. 520.
(6) P. 29.
(7) P. 87.

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concessit." There was, therefore, no doubt at all expressed upon that part of the case. "And in Michaelmas Term, (24 Eliz.), Edward Fisher was in execution at the suit of Serjeant *Puckering*, and afterwards procured himself to be in execution at the suit of the Queen, and came into Court by Serjeant *Fenner*, and prayed that he might have leave to go to his counsel, when good sureties found to the Court. SHUTE: The party has interest in his body as well as the Queen. MANWOOD: But if the Queen had first execution, then it was doubted when he was in the Common Pleas, in the case of *Draycot*. SHUTE and CHICK: It is all one in our opinion; and of the same opinion was GAWDY, Justice." It is also stated in the same work (1), that "the distinction taken in Godbold, p. 298, is, that where the party is first taken for the Crown, there the subject cannot have an interest in his person *simul et semel* with the King; but where the party is first taken by the subject, there the subject may have an interest in his debtor's person *simul et semel* with the Crown. But it may be that there are many cases which this distinction will not reconcile." There the Queen's remembrancer was an officer certifying the practice of the Court, that a party in custody at the suit of the Crown might go out with the keeper, as in the present case. In Dyer (2) it is said, "And by the leave of the Court he shall be suffered with a keeper to go to his counsel, with instructions to prosecute the attaint."

[219] *Watson* and *J. Wilde*, who also appeared to show cause on the part of the Crown, were stopped by the COURT:

Lush and *J. W. Rogers*, in support of the rule:

The first point upon which this rule was obtained is admitted not to be sustainable. As to the second point, it is submitted that the case stands upon a different footing from that upon which it has been put by the *Attorney-General*. This is not the case of a voluntary escape, in the sense in which that term is ordinarily used. The Crown cannot take its debtor out of prison without a writ of *habeas corpus*, or the leave of a court of law. Here the debtor was dealt with under the authority of the Crown.

(POLLOCK, C. B.: If the Crown has the right so to deal with its debtor, then *cadit quæstio*; if the act be wrong, then the Crown is not bound by the act of its officer.)

(1) P. 88. (2) Vol. 3, p. 365 a.

This is the act of the Crown itself. A person who is wrongfully taken out of custody cannot be taken again into custody under the same authority by which he had been previously detained. There is a case in Dyer (1), where it is said, that "the command of the Treasurer and Chancellor are not sufficient warrant to license one condemned in execution to go with a keeper, or otherwise, at large, for the Queen herself could not do that, as was holden by the opinion of all the justices of both Benches in the time of Queen Mary."

(PARKE, B.: There the debtor was in custody at the suit of a subject as well as of the Crown, but that is not the case here.)

The law has always regarded with great jealousy the rights of the Crown as affecting the liberty of the subject. In *Thurland's* case (2), it was held that the Crown cannot authorise a person, in execution at the suit of a subject, to be taken up for any purpose of its own. The case in Savile may be distinguished from the present, as there it was a matter *ex gratiâ* to the subject *himself, but here it is adverse to him. The general rule is, that where there has been a voluntary escape, the party cannot be retaken under the same writ.

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POLLOCK, C. B.:

I am of opinion that this rule ought to be discharged. There are several points that might have arisen in this case, and which might have called for a more deliberate and serious judgment; for in some respects the cases may be questioned, and the authorities are to a certain extent conflicting. If the defendant had been in custody at the suit of the subject as well as of the Crown, there might exist a doubt whether the priority of the one or the other would create a difference as to the liability of the sheriff or the liability of the creditor. The question, however, before us is simply this: a defendant in execution, and in custody under a writ of extent, is removed by an order of the Commissioners of Excise (the order being directed to a particular sheriff) for the purpose of giving evidence touching the matter of the extent itself. He is accordingly taken, and returns into the same custody; and the question is, whether he is now entitled, as against the Crown, to his discharge. I am of opinion that he is not. I do not mean

(1) Vol. 3, p. 297 a. (2) 2 Dyer, 162 b.

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to throw any doubt upon the Crown's right to remove the defendant; but that is a question which is very different from the present. Here the question involves this principle only, viz. that the Crown cannot be prejudiced by the misconduct or negligence of any of its officers, whether with respect to the rights of property or the right to the custody of the debtor till the debt is paid. The case in Savile is an authority for the principle for which the *Attorney-General* contends, and upon that part of the case there is no doubt whatever. As to the other question there is some doubt, and the authorities are conflicting on that point. I have always understood it to be a maxim of the common law, [*221] that the Crown cannot ever be prejudiced by *the *laches* of any of its officers. That being so, the present case is clear, without reference to the case in Savile, or to any other authority.

PARKE, B.:

I entirely concur with the LORD CHIEF BARON. I think that the only point we have to decide is, whether, if after an escape (which we may assume to be voluntary) the defendant is again in the custody of the sheriff, he is lawfully in custody under the former extent. I think that is the only point we have to decide. I do not mean to decide that the authority of the Crown would not be a justification for taking the debtor out of the sheriff's custody during that time; but I assume, for the purpose of the argument, that there has been a voluntary escape permitted by the sheriff, and that he has the debtor in custody again under the former writ of extent. Now, there is a clear distinction, according to the authority in Savile, between the case of the subject and that of the Crown. In the former case, there is no doubt that the sheriff could not retake the defendant, because it was his own voluntary escape, and the subject could not take the defendant again, because he is bound by the act of the officer. But in the case of the Crown, as it is not bound by the act of the officer, the escape is nothing. It is an act of wrong on the part of the sheriff who permits the escape, but the execution is not satisfied. I should have come to the same conclusion to which I have arrived in the present case upon principle, and without the authority of the case in Savile, which is directly in point. There the distinction is to be observed between the process of the Crown and the process of the subject; in the former case, the debt is satisfied by the sheriff's voluntarily permitting the defendant's escape, but that is not so in the case of the Crown. As

to the disputed points in the case, upon which it is not necessary for us now to give any opinion, the principal one is, whether, in the case of a subject as well as the Crown having the *debtor in execution, the act of the sheriff in taking the debtor's person out of custody *quoad* the subject is an escape or not. *Primâ facie*, it would appear that, if a voluntary escape be shown, it is an injury to the subject, and then he has his remedy. Then if the principle be correct that is stated in one of the cases in Dyer, where the executions, as between the Crown and the subject, conflict, it is held that the debtor is really not in execution at the suit of the subject until the execution of the Crown is satisfied. If that is the correct view, and which, according to Lord Chief Justice HULLAND, is so, that disposes of the question. Then, if he is in custody at the suit of both, the Crown and the subject, the act of the officer of the Crown cannot prejudice the subject: but that is a question upon which we are not at present called to give any decision. For the reasons which I have before given, I think that the defendant is rightly in custody. [*222]

ROLFE, B.:

I am of the same opinion. The question here lies in a very narrow compass, and it seems to me to be entirely governed by that part of the case in Savile which is not controverted by any of the authorities. "It was stated by Fanshawe, the Queen's remembrancer," (which, I agree, means it was stated officially), "that if one be in execution at the suit of the Queen, in the Fleet, the Warden of the Fleet may suffer him to go to his counsel with his keeper; but it is otherwise if he be in execution at the suit of a common person; and the reason is this, that if he that is in execution for the Queen happens to escape, the Warden for the Queen may retake him; but it is otherwise in the case of a common person." That evidently applies to the case of a voluntary escape. This case is unqualified by any authority with respect to the case of a voluntary escape with the consent of the keeper. Upon the same writ, the keeper may retake him; but there is introduced into the case this additional fact, that the voluntary escape was by *the consent of the officer of the Crown, which officer cannot give a consent that shall prejudice the rights of the Crown; and the case stands precisely in the same condition as if he had not given any consent; and therefore the party may be retaken, and, being retaken, is in the lawful custody of the Crown. If it were necessary [*223]

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to enter upon the other point in the case, I must own I see very great doubts on that point.

PLATT, B.:

I agree that this rule ought to be discharged. I think, under the present circumstances, the case in Savile is a direct authority.

Rule discharged.

1848. *May* 12.

JONES *v.* BONNER AND NASH (1).

(2 Ex. 230—234; S. C. 17 L. J. Ex. 343; 5 Dowl. & L. 718.)

[230]

Where a pauper plaintiff settles the action behind the back of his attorney, it is entirely a question for the discretion of the Court, under the particular circumstances of the transaction, whether they will interfere and set aside the proceedings.

Where a pauper plaintiff settled the action behind his attorney's back, by executing a release, but it appeared that he was the first to make the application, and that the arrangement was fair and reasonable, the defendant having pleaded a plea of release *puis darrein continuance*, the COURT refused to set aside the deed and the plea at the instance of the attorney.

SKINNER had obtained a rule in the present Term, on the part of the plaintiff's attorney, calling upon the defendants to show cause why the plea of release *puis darrein continuance*, and the deed of release therein mentioned, should not be set aside.

It was an action of trespass brought by the plaintiff, who had been admitted to sue *in formâ pauperis*. Issue had been joined, and notice of trial was given for the Herefordshire Spring Assizes in 1848. In March, 1848, a plea of a release *puis darrein continuance* was delivered to the plaintiff's attorney, who thereupon countermanded the notice of trial, and the cause was not tried. It appeared from the affidavits, which were of rather a contradictory character, that the action had been brought for an alleged trespass to the

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cottage and goods of the plaintiff, committed by the *defendant Nash, who had acted under the commands of Bonner, the plaintiff's landlord. The plaintiff, in his affidavit, stated, that he was sorry he had executed the release, but that he had been induced to do so by reason of a promise made to him by Bonner that he would give him a sovereign, and by one Bodenham, who promised he would put him into a cottage. The plaintiff's attorney, in his affidavit, swore that the plaintiff and Bonner had colluded together to deprive him of his costs, and that the release was executed with this design. This was denied by Bonner's affidavit, and he stated therein that

(1) See *Francis* v. *Webb*, (1849) 7 C. B. 731.—J. G. P.

the plaintiff came of his own accord to settle the action; that he gave the plaintiff the sovereign to assist him and his family, who were in very distressed circumstances; that the release in question was signed by the plaintiff at his house, after having been twice read over to him and explained; and that no cottage had ever been offered to the plaintiff by Bodenham, or by any other person, to induce him to execute that instrument. There were other affidavits in confirmation of Bonner's statement.

Martin now showed cause:

A plaintiff is not precluded from settling an action, by reason of his suing *in formâ pauperis*, when he acts *bonâ fide*. The plaintiff is *dominus litis*, and upon these affidavits it appears that there was no collusion between him and the defendants. He executed the release, by his own statement, to get rid of the action; and he was to receive an equivalent. The case of *Wright* v. *Burroughes* (1) will be relied upon by the other side; but there the plaintiff expressed a desire "to deprive the lawyers of costs." That case cannot be relied upon as laying it down as a rule of law, that a pauper plaintiff cannot settle the action without regard to his attorney.

(POLLOCK, C. B.: It must be a matter in the discretion of the *Court, under the circumstances of each particular case. [*232]

ROLFE, B.: Chief Justice TINDAL there says, "I will not say that cases may not arise in which it may be lawful for a pauper plaintiff to settle with the defendant, without regard to his attorney's lien." If there is then a case, I think the present is such a case.)

(He was then stopped by the COURT.)

Skinner, in support of the rule:

A pauper plaintiff does not stand in the same situation as a plaintiff who has not been admitted so to sue. In all cases where the plaintiff has been held to be *dominus litis*, he has been solvent. The attorney, in such a case as the present, looks to the result of the action for his recompense. The transaction must, therefore, partake of the nature of a collusion, when the party settles the action behind the back of his attorney, to whom he has entrusted the conduct of the whole matter.

(1) 71 R. R. 459 (3 C. B. 344).

JONES v. BONNER.

(PLATT, B.: In *Wright* v. *Burroughes*, MAULE, J., says, "Here, however, the client cheats his attorney of his costs, and gets nothing himself.")

POLLOCK, C. B.:

I am of opinion that this rule ought to be discharged. In the case in the Court of Common Pleas, which has been relied upon, the Court exercised their discretion upon the facts of that case; but so far from laying it down as a matter of law, that the attorney to a pauper plaintiff is *dominus litis*, Chief Justice TINDAL expressly guards himself against such a position. We are not bound by that case, in which the facts were different from those in the present, and I think that the question is one entirely for the discretion of the Court. We cannot assume that an attorney undertakes a cause for a person who has been admitted to sue *in formâ pauperis* upon the understanding that he may go on in spite of the plaintiff, and that he, and not the plaintiff, is *dominus litis*. If we are to make
[*233] that *assumption, *Mr. Skinner's* argument is correct. But I do not think that we can make such an assumption. It is very likely that the Court, in the case of a pauper plaintiff, would look more narrowly into all the circumstances of a transaction of such a nature in order to protect the attorney from the collusion of the parties to deprive him of his costs; but the mere naked fact, that the action has been settled behind the attorney's back, could not be of itself a sufficient ground for the interference of the Court. In the present case it appears to have been a fair, reasonable, and *bonâ fide* arrangement between the parties; and I should be exceedingly sorry that in pauper, as well as in other cases, parties should not be permitted to make peace upon fair and equitable terms, and so to put an end to litigation. I should be exceedingly sorry to put any impediment in the way of such an arrangement.

ROLFE, B.:

I am of the same opinion. In the case of *Wright* v. *Burroughes*, the late Chief Justice TINDAL, in the commencement of his judgment, as I have before observed, does not say that in no case can a pauper plaintiff settle the action without regard to his attorney's lien. Now, assuming it to be competent for the parties to settle the action behind the attorney's back, I think that this is just one of those cases in which it should be allowed, for it appears to me that the action would have resulted in nominal damages only. So

far from seeing that there is any collusion on the part of the defendants to deprive the attorney of his costs, the plaintiff himself appears to have pressed the arrangement upon the defendant Bonner. I cannot shut my eyes to the language of the plaintiff's affidavit, which I do not think is deserving of much credit, and by which the action seems to me to be evidently that of the attorney. If, then, there is a case in which the Court ought not to interfere, I think the present is that case.

PLATT, B.: [234]

I entirely concur with the rest of the COURT. It seems to me that a pauper plaintiff has the same right as any other plaintiff, by a *bonâ fide* arrangement, to put an end to an action. If it were not so, pauper plaintiffs would become mere instruments in the hands of their attornies for the purpose of obtaining costs. It seems to me, that when an attorney undertakes to conduct the cause of a pauper plaintiff, as he takes him for better or worse, it becomes his duty to take care to inquire into his character, and to see that he is an honest man. This rule would be a salutary one, and would prevent attornies from undertaking the case of any rogue and vagabond who might apply to them for their assistance. It would, no doubt, be right that the Court should interfere in a case where the parties put an end to the suit by collusion, for the purpose of cheating the attorney of his costs, but I do not think that such appears clearly from these affidavits to have been the case here. I am therefore of opinion that this rule ought to be discharged.

Rule discharged, with costs.

IN RE NORTH STAFFORDSHIRE RAILWAY CO. AND LANDOR AND OTHERS.

1848. *May* 4.

(2 Ex. 235—243; S. C. 17 L. J. Ex. 350.) [235]

A Railway Company, in pursuance of the 18th section of the Lands Clauses Consolidation Act, (8 Vict. c. 18), gave notice to L. and H., the parties interested in certain land required for the railway, to treat for the purchase thereof. L. and H. then served the Company with a notice stating that, as trustees under the will of F., they claimed an estate and interest in certain copyhold lands and hereditaments, situate &c., required to be purchased by the Company, and they claimed 3,344*l.* 17*s.* 6*d.*, as the amount of compensation for the said lands and hereditaments, and desired to have the same compensation settled by arbitration, and appointed T. one of the arbitrators. Another arbitrator having been appointed by the Company, the two arbitrators nominated an umpire, who proceeded with

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the reference, when W. claimed compensation, alleging that he had a leasehold interest in the lands in question. The umpire awarded 1,861*l.* to be paid by the Company to L. and H., as such trustees, for the purchase of the fee-simple in possession, free from all incumbrances, of and in the copyhold lands and hereditaments required to be purchased by the Company: Held, that, under the statute, the award was bad, the umpire not having found the nature of the interest of L. and H. in the lands, and awarded a distinct compensation in respect of it; but the COURT refused to set the award aside, leaving the Company to dispute it when the parties should attempt to enforce it.

Quære, whether it was binding on the parties by reason of their conduct?

THIS was a rule calling on Thomas Landor, Richard Hughes, and Robert Hughes to show cause why an award should not be set aside. It appeared from the affidavits, that, on the 30th of December, 1846, the North Staffordshire Railway Company (Pottery line), who were incorporated by the 9 & 10 Vict. c. lxxxv., gave notice, under the 18th section of the Lands Clauses Consolidation Act, (8 Vict. c. 18), to Thomas Landor, Richard Hughes, and Robert Hughes, that they required to purchase certain lands and hereditaments in which the said Thomas Landor, Richard Hughes, and Robert Hughes were interested, and they demanded the particulars of their estate and interest therein. On the 15th of May, 1847, Landor and the others sent to the Company the following notice:

"To the North Staffordshire Railway Company, &c.—We the undersigned, Thomas Landor, Richard Hughes, and Robert Hughes, do hereby give you notice, that, as trustees named and appointed in and by the last will and testament of Francis Figgins, of &c., we have and claim an estate and interest in certain copyhold lands and hereditaments situate in Sutton, in the parish of Prestbury, in the county of Chester, required to be purchased or taken by the said Company for the purposes of their said railway; and that we
[*236] do claim compensation for the said lands and hereditaments, *and that the sum of 3,344*l.* 17*s.* 6*d.* is the amount of compensation we so claim.

"And we do hereby give you notice and require you to purchase a certain plot of land, part of the said lands and hereditaments situate in Sutton aforesaid, which will be cut off and divided by the works of the said railway, and adjoining or near to the plot of land numbered 422 in the plan and book of reference of the said Company. And we do hereby signify our desire to have the same compensation settled by arbitration. And we do hereby nominate and appoint Thomas Hill, of &c., to be one of the arbitrators in the premises; and we do hereby request you to nominate and appoint another

arbitrator; to which said arbitrators, or their umpire, the said claim shall be referred. Dated &c.

"THOMAS LANDOR,
"RICHARD HUGHES,
"ROBERT HUGHES."

On the 19th of May, 1847, the Railway Company sent to Landor and the others the following notice:

"Whereas the North Staffordshire Railway Company require to purchase and take certain lands and hereditaments for the purpose of the North Staffordshire Railway (Pottery line) Act, 1846, situate in the parish of Prestbury, in the county of Chester, and which are wholly or part of the lands and hereditaments numbered 317, 401, 402, 413, 416, 417, and part of 422, in the plan and book of reference for the railway authorised to be constructed by the said recited Act for the said parish of Prestbury: and whereas, on the 14th day of January last, a notice of the intention of the North Staffordshire Railway Company to purchase and take, for the purposes aforesaid, the said lands and hereditaments, was duly served on Thomas Landor, and, on the 15th day of January last, a notice of such intention was duly served on Richard Hughes and Robert Hughes, as the owners of, or as parties interested in, the said lands and *hereditaments, or as parties enabled, by the Lands Clauses Consolidation Act, 1845, to sell and convey or release the same lands and hereditaments to the said Company; and the said lands and hereditaments so required as aforesaid were, on the said notices so served on you as aforesaid, for better description, delineated on the plan attached to each of the said notices, or delivered therewith, and were therein distinguished by a red colour: and whereas they have stated the particulars of their claim in respect of the said lands and hereditaments to be, that such lands and hereditaments are of copyhold tenure, and you claim the sum of 3,344*l.* 17*s.* 6*d.* as compensation for the same lands and hereditaments, and they and the said Company have not agreed as to the amount of compensation to be paid by the said Company for the interest in such lands belonging to them, or which they are, by the Acts before recited and referred to, enabled to sell, and for the damage to be sustained by them by reason of the execution of the works of the said railway: and whereas the said Thomas Landor, Richard Hughes, and Robert Hughes have, by notice in writing, bearing date the 15th day of May instant, signified to the said Company

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their desire to have the question of such compensation settled by arbitration: now I the undersigned, Jonathan Samuda, Secretary to the said North Staffordshire Railway Company, do hereby nominate and appoint Thomas Kempson, of &c., as arbitrator on behalf of the said Company, to whom, with the arbitrator appointed by the said Thomas Landor, Richard Hughes, and Robert Hughes, shall be referred the question as to the amount of compensation to be paid by the said Company for the purchase of the said lands and hereditaments, or of the interest of the said Thomas Landor, Richard Hughes, and Robert Hughes therein, or for the interest of any other person or persons which, by the said Acts hereinafter recited or referred to, you the said Thomas Landor, Richard Hughes, and Robert Hughes are enabled to sell, and also for the damage
[*238] that *may be sustained by the said Thomas Landor, Richard Hughes, and Robert Hughes, or such person or persons as aforesaid, by reason of the execution of the works of the said Company. Dated &c.

"J. SAMUDA,
"Secretary to the said North Staffordshire Railway Company."

The arbitrators appointed an umpire, under the 27th section of the Lands Clauses Consolidation Act, and several meetings took place, at which one Thomas Wright claimed compensation, on the ground that he had an agreement for a renewal of an expired lease of the land in question, for a term of seven years from Christmas, 1846, for the purpose of making bricks, under which agreement he had paid rent, and on the faith of which he had expended a large sum of money in building sheds and erecting a steam-engine. The two arbitrators having failed to make their award within the time limited by the 31st section of the above Act, on the 8th of November the umpire made his award, the material part of which is as follows:

"I do hereby award and determine that the sum of 1,861*l.* 2*s.* 6*d.* is the value, and shall be paid by the said North Staffordshire Railway Company to the said Thomas Landor, Richard Hughes, and Robert Hughes, as such trustees as aforesaid, for the purchase of the fee-simple in possession, free from all incumbrances, of and in the said copyhold lands, tenements, and hereditaments described in the said first-recited notice, and delineated in the plan thereunto attached or delivered therewith, and therein coloured red, and

required to be purchased and taken as aforesaid. And that the further sum of 1,040*l.* 18*s.* 4*d.* shall be paid by the same Company to the said Thomas Landor, Richard Hughes, and Robert Hughes, as such trustees as aforesaid, as compensation for the damage that has been or will be sustained by the said Thomas Landor, Richard *Hughes, and Robert Hughes, as such trustees as aforesaid, by reason of the execution of the said railway and works, and also of the severing of the same lands and hereditaments from the other lands of the said Thomas Landor, Richard Hughes, and Robert Hughes, as such trustees as aforesaid, or otherwise injuriously affecting such other lands, by the exercise of the powers of the said Lands Clauses Consolidation Act, 1845, or of the Act or Acts authorising the said railway and works, or any Act incorporated therewith," &c.

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On the 16th of December the Company's solicitor sent to the solicitor of Landor and the others a copy of the award, at the same time giving notice of Wright's claim, and stating, that, in the event of his taking proceedings against the Company to obtain compensation, they should deduct the amount from the purchase-money. On the 20th of December the solicitor of Landor and the others returned for answer, that they considered Wright had no claim on them for compensation, and that they could not allow the Company to make any deduction from the purchase-money awarded. On the 27th of December, 1847, the solicitor of Wright gave notice to the Company not to pay to Landor and the others the sum awarded until an arrangement had been made with Wright. The following are the substantial grounds upon which the rule *nisi* was obtained:

"That the umpire has not, in or by his award, decided what is the amount of compensation to be paid by the North Staffordshire Railway Company for the interest of Thomas Landor, Richard Hughes, and Robert Hughes, in the lands and hereditaments, in the award mentioned, required by the Company to be purchased and taken. That the said Thomas Landor, Richard Hughes, and Robert Hughes, having a limited interest only in the said lands and hereditaments, and not being enabled, by the said Acts of Parliament in the award mentioned or otherwise, to sell the interest therein *of Thomas Wright, in the affidavit in this case mentioned, and such interest of the said T. Wright having been notified to and proved before the said umpire, he, the said umpire, ought to have awarded a distinct sum for the said interest of the said Thomas

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Landor, Richard Hughes, and Robert Hughes: by his only awarding a gross sum for the fee-simple in possession, free from all incumbrances, it cannot be ascertained what amount is to be paid to the said Thomas Landor, Richard Hughes, and Robert Hughes, for their interest in the said lands and hereditaments, and that there is no machinery in the said Acts or either of them to apportion or ascertain the proportion of the said sum of 1,861*l.* 2*s.* 6*d.* in the said award mentioned which is to be paid to them, and the proportion thereof which is to be paid to the said T. Wright, or to any other incumbrancer or person entitled to any interest in the said lands and hereditaments. That the award is bad, because the said Thomas Landor, Richard Hughes, and Robert Hughes did not, in and by their notice in the said award mentioned, or in or by their claim therein mentioned, or by the said appointment of arbitrator therein mentioned, or otherwise howsoever, state the nature of the interest belonging to them in the said lands and hereditaments in respect whereof they claimed compensation, or the particulars of their estate and interest in the said lands and hereditaments in respect whereof they claimed compensation."

Martin showed cause:

[241] * * The notice by Landor and the others of their claim to the lands in question, and the appointment by them of an arbitrator, was a valid proceeding under the 23rd section; or, if not, the objection has been waived by the conduct of the parties.

(PARKE, B.: Reading the terms of the appointment together with
[*242] the terms of the award, it does not appear *what interest these parties had in the lands, nor what is the value of the interest which they are capable of conveying. The umpire only awards that 1,861*l.* 2*s.* 6*d.* is the value, and shall be paid for the purchase of the fee-simple.)

The award in substance finds that the interest of the parties is a fee-simple in possession, and that 1,861*l.* 2*s.* 6*d.* is the value of that interest. If they fail to make out a title to the fee-simple, free from all incumbrances, the proper course is to proceed under the 76th and three following sections, by which the purchase-money may be deposited in the Bank and distributed by the Court of Chancery.

(PARKE, B.: The award is bad for uncertainty. It is made in

pursuance of the submission, but that is not according to what the statute prescribes. As at present advised, it seems to me that the award could not be enforced by attachment; and on the other hand, it could not be set aside, because the parties, by their conduct, have agreed to that submission, though not according to the statutory form. The award ought to find the particular interest of the parties, whether an estate in fee or for life, or what other interest. In this case, perhaps, the umpire could not decide whether Landor and the others were entitled to the fee-simple or a mere equitable interest, because they have not stated, in their notice, what interest they possess. The question then is, what did the parties mean to refer? The appointment of an arbitrator is good evidence against them of what they intended. They agreed to refer the value of all the interest which Landor and the others were capable of conveying, and the difficulty is in saying what the arbitrators are to do on that reference. The umpire has neither valued the interest of Landor and the others, nor has he found, as a fact, that they were entitled to the fee-simple; he only says, that the value of the fee-simple, if they have the power of conveying it, is 1,861*l.* 2*s.* 6*d.*

PLATT, B.: The umpire ought to have awarded to Landor and the others a compensation for their interest, *minus* that of Wright.)

The COURT then called on [243]

Crompton to support the rule:

It clearly appears that there was a tenancy from year to year outstanding in Wright, which the umpire has omitted to notice. The meaning of the appointment, which the statute makes a submission, is this, that the interest of the parties which they are capable of conveying, and its value, shall be the matter which the arbitrators shall ascertain. Here the umpire has not found what interest Landor and the others possessed; for, there being an outstanding term in Wright, the umpire only finds that a certain sum is the value of the fee-simple, leaving the parties to divide it. But the compensation to be paid to a tenant from year to year must, under the 121st section, be determined by two justices. It is said, that the conduct of the parties may render the submission valid, though not according to the statutory form; but the Company, being a corporation, cannot agree to any other mode of submission.

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(PARKE, B.: If the Company are not bound by anything but the statutory submission, they can neither maintain an action nor proceed by attachment.

POLLOCK, C. B.: There is no necessity for the assistance of the Court.)

Per CURIAM (1):

The rule must be discharged, but without costs.

1848. *May* 4.

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IN RE NORTH STAFFORDSHIRE RAILWAY CO. AND WOOD AND ANOTHER.

(2 Ex. 244—251; S. C. 17 L. J. Ex. 354.)

A Railway Company having given notice to the owners of certain land, delineated in a plan annexed, to treat for the purchase thereof, the landholders thereupon gave the Company a notice, stating that their interest in the said land was particularly described in a schedule of claim served therewith; and that they claimed as compensation for the same, and for damage sustained by the execution of the railway, 2,280*l.*; and that, upon payment of such sum, they were willing to convey all their estate in the said land; and that, if the amount were not paid, they desired the matter to be settled by arbitration, and required the Company to appoint an arbitrator. In the schedule of claim annexed to this notice were included certain pieces of land, which the owners, under the 93rd section, required the Company to purchase as lands severed by the railway, and respectively of less than half an acre. The Company then gave the landholders a notice, whereby, after reciting the landowners' notice, they appointed an arbitrator, to whom was to be referred the amount of compensation to be paid to the landowners "for the purchase of the said lands." The arbitrators appointed an umpire, who received evidence of the value of the pieces of land less than half an acre, and awarded one entire sum for the purchase of the fee-simple of the land which the Company required to purchase, and also of the portions of land which the owners required the Company to purchase: Held, that the award was bad, there being no valid submission in respect of the last-mentioned lands; but the COURT refused to set the award aside, leaving the Company to dispute it when the parties should attempt to enforce it.

Whether the award could be supported by reference to the conduct of the parties, *quære.*

THIS was a rule calling on Charles Wood and Richard Wood to show cause why an award or umpirage should not be set aside, under the following circumstances: On the 30th December, 1846. the North Staffordshire Railway Company, in pursuance of the 18th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, gave the Messrs. Wood notice to treat for the purchase of

(1) POLLOCK, C. B., PARKE, B., ROLFE, B., and PLATT, B.

certain lands situate at Sutton, in the parish of Prestbury, in the county of Chester, and numbered 374, 375, 376, and 377, in the plans and books of reference of the Company, and delineated in a plan thereunto annexed. This property consisted of a reservoir or pool of water for supplying water-wheels in Macclesfield. On the 4th of June, 1847, the Company served the Messrs. Wood with another notice to treat for the purchase of other land adjoining the land previously referred to, and numbered 372 and 372 a. This land was used solely for agricultural purposes. On the 23rd of June, the Messrs. Wood gave notice of the appointment of an arbitrator, the material part of which is as follows: "We do hereby inform you, that we are the owners in fee-simple and in copyhold tenure, and also lessees for a certain term yet unexpired, of the lands, tenements, and hereditaments *mentioned or referred to in [*245] the said notices; and that such our interest therein, whether of a freehold, copyhold, or leasehold nature, is particularly described in the owner's schedule of claim served herewith; and that we claim, as compensation for the purchase-money for the same, and for the damage that may be sustained by us by reason of the execution of your railway works, the sum of 2,280*l.* 8*s.* And take notice, that we are ready and willing, on payment of the said sum of 2,280*l.* 8*s.*, to sell, convey, release, surrender, and assign to you, the said Company, all our estate, right, title, and interest in the said lands, tenements, and hereditaments, according to the provisions contained in the said Acts of Parliament in your said notices mentioned. And we do further give you notice, that we shall require you, in addition to such compensation, to preserve and reconnect, in a proper and efficient manner, and without delay, all existing communications for the conveyance of water from the larger moss pool to our present mills and factories in Sutton aforesaid. And further take notice, that if our said claim of 2,280*l.* 8*s.*, as and for compensation as aforesaid, shall not be paid or accepted by you, we hereby, in pursuance of the provisions contained in the said Act, or any other Act or Acts of Parliament, signify to you our desire to have the amount of the said compensation to be paid to us settled by arbitration. And we do hereby require you, the said Company, to appoint an arbitrator," &c. In the schedule annexed to this notice, the Messrs. Wood claimed 971*l.* 18*s.* for the value of the land, 152*l.* 10*s.* as compensation for the severance and injury to the adjoining land, 683*l.* for damage done to the water privileges and severance, and 473*l.* for the purchase of parts of 372 a, 374, and

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375, as not being lands within a town, and built upon, and which would be cut through and divided by the railway, so that they would be left respectively of less quantity than half a statute acre. On the 7th September, the Company served the Messrs. Wood with notice of the appointment *of an arbitrator. This notice, after reciting the substance of the Company's two notices to treat for the purchase, and also that Messrs. Wood had stated the particulars of their claim in respect of the said lands to be 2,280*l.* 8*s.*, proceeded in the following terms: "Now we, the said North Staffordshire Railway Company, hereby, under the hand of me, the undersigned J. Samuda, secretary to the said Company, nominate and appoint George Clarke Pauling, of &c., arbitrator, to whom shall be referred the question as to the amount of compensation to be paid by the said Company for the purchase of the said lands and hereditaments, or of the interest of the said Richard Wood and Charles Wood therein, and for the interest of any other person or persons, which, by the said Acts hereinbefore recited or referred to, they, the said Richard Wood and Charles Wood, are enabled to sell, and also for the damage that may be sustained by the said Richard Wood and Charles Wood, or such person or persons as aforesaid, by reason of the execution of the works of the said Company."

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The two arbitrators nominated an umpire, who, together with them, proceeded with the reference, when the Messrs. Wood gave evidence of the value of certain portions of the land, numbered in their schedule 372 a, 374, and 375, the same being lands not within a town and built upon, and which would be cut through and divided by the railway, so that they would be left of less quantity than half an acre respectively; and they contended, that the Company were bound, under the 93rd section, to purchase these portions of land. This evidence was received by the arbitrators, although it was objected to by the Company, on the ground that it was not included in the lands specified or alluded to in the Company's appointment of an arbitrator, which constituted their submission to arbitration. The arbitrators having failed to make their award within the time limited by the Act of Parliament, the umpire made his award, whereby (after reciting the notices, and also reciting that the Messrs. Wood *required the Company to purchase, along with the lands required for the purposes of the said railway and works, parts of the lands numbered 372 a, 374, and 375, the same being lands not within a town or built upon, which would be cut through and divided by the said railway and works, so that they would be

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left respectively of less quantity respectively than half a statute acre, and that they had no land adjoining into which the same could be thrown, so as to be conveniently occupied therewith) he awarded as follows: "I do hereby award and determine, that the sum of 1,444*l.* is the value, and shall be paid by the said North Staffordshire Railway Company to the said Charles Wood and Richard Wood, for the purchase of the fee-simple in possession and copyhold tenure and interest, free from all incumbrances, except the usual copyhold rent and services in respect of the said copyhold land and hereditaments, and also the leasehold interest, as set forth in the said claim of the said Charles Wood and Richard Wood, of and in the said lands, tenements, and hereditaments, described in the before-recited notices, and delineated in the plans to the same notices respectively attached or delivered therewith, and therein coloured red, and required to be purchased and taken by the said Company as aforesaid, and also required by the said Charles Wood and Richard Wood, in their notice and claim delivered to the Company, to be purchased and taken by the said Company as aforesaid; subject, nevertheless, as to the said leasehold tenements, to a proportionate part of the said rent of 210*l.*, to which the same, with other tenements, is subject and liable, according to the quantity of land taken, and to be apportioned under the provisions of the Lands Clauses Consolidation Act, 1845. And that the further sum of 732*l.* shall be paid by the same Company to the said Charles Wood and Richard Wood, as compensation for the damage that has been or shall be sustained by the said Charles Wood and Richard Wood, by reason of the execution of the said railway and works, and also of the severing of the *same lands, [*248] tenements, and hereditaments from the other lands, tenements, and hereditaments of the said Charles Wood and Richard Wood, or otherwise injuriously affecting such other lands, by the exercise of the powers of the said Lands Clauses Consolidation Act, 1845, or of the Act or Acts authorising the said railway and works, or any Act incorporated therewith."

The following were the principal grounds on which the Company moved to set aside the award: That the umpire has exceeded his authority by awarding one gross sum for the purchase of the land required to be purchased and taken by the North Staffordshire Railway Company, and of the land required by Charles Wood and Richard Wood, in their notice and claim in the said award mentioned, to be taken and purchased by the said Company, inasmuch

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as the umpire had no authority to award any sum in respect of the last-mentioned land—that is to say, the land required by the said Charles Wood and Richard Wood, to be taken and purchased as aforesaid—or to make any award or umpirage as to such last-mentioned land; and as it cannot be known or ascertained from the said award how much of the said sum of money so awarded for the purchase is awarded in respect of the land required by the said Company, and how much is awarded in respect of the land required by the said Charles Wood and Richard Wood to be taken, the award is, therefore, bad altogether. That the umpire has included in his award, and awarded upon a matter not submitted to him—that is to say, the amount of the purchase-money of the land not required by the Company to be taken, but required by the said Charles Wood and Richard Wood to be taken. That the award or umpirage is void, as the two parties thereto never agreed upon the same subject-matter for the arbitrators or umpire to decide; and that the said Company only agreed that the award should be as to the land required by them to be taken; whereas the said Charles Wood and
[*249] Richard *Wood agreed that the award should be both as to the land required by the Company to be taken, and the land required by themselves, the said Charles Wood and Richard Wood, to be taken; and the said Charles Wood and Richard Wood never agreed to be bound by any award or umpirage which should not include the amount to be paid for the purchase of the said last-mentioned land.

Martin and *Townsend* showed cause:

The objection, in substance, is, that the umpire ought not to have awarded in respect of the parts of 372 a, 374, and 375, which were severed by the railway, so that they were respectively of less than half an acre. * * According to the true construction of the Act, the Company are to give notice of the land they require to purchase; then, if the owners have any land within the description of the 93rd section, they are to give a notice requiring the Company to purchase that land, and thereupon the Company are bound to do so. The two notices, taken together, make a valid submission in respect of the portions of land less than half an acre; for the Company, in their notice, refer, in express terms, to the claim of 2,280*l.*, by Messrs. Wood, as compensation for the land mentioned in their notice—that is, both the land which the Company required
[*250] to purchase and that which they were bound, by the 93rd *section, to purchase.

(PARKE, B.: The Company only propose to refer the amount of compensation to be paid for the land which they are willing to take.)

Upon notice by the Company, a two-fold right accrued to the owners of the land, namely, a right to compensation for the value of the land which the Company require to purchase, and a further right of insisting upon the purchase, by the Company, of the portions of land less than half an acre. The parties are concluded by their conduct before the arbitrator, for they acted as if the matter referred were the value of the entire lands: *Reg.* v. *The Trustees of Swansea Harbour* (1).

(PARKE, B.: It is clear that the umpire has fixed the sum awarded as the value of the entire lands. The award is bad, but whether we ought to set it aside is another question.

POLLOCK, C. B.: If the objection is quite patent, there is no necessity for our interference.)

Crompton, in support of the rule:

The umpire has awarded upon a subject-matter in respect of which he was not authorised to adjudicate by either party, or, at all events, by the Company. It is true that the schedule annexed to the notice of Messrs. Wood includes the entire lands; but that schedule is a mere description of their estate or interest, and forms no part of the appointment of the arbitrator. The notice by Messrs. Wood is distinctly confined to the land mentioned or referred to in the Company's notice; and the two documents, read together, clearly exclude the small portions of land. If the submission is not in accordance with the provisions of the statute, the Court are bound to interfere.

POLLOCK, C. B.:

The rule must be discharged, but without costs.

PARKE, B.:

I do not think it possible to enforce this *award, for it is clearly bad. The two notices evidently refer *ad idem*; therefore, nothing is submitted to the arbitrators but the value of the land which [*251]

(1) 8 Ad. & El. 439.

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the Company required to purchase. Whether the award can be supported by anything irrespective of this submission is another matter.

ROLFE, B., and PLATT, B., concurred.

Rule discharged.

1848.
May 2.

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REG. *v.* ADAMS AND WARREN (1).

(2 Ex. 299—301.)

An extent in chief may issue against a banker for the recovery of interest allowed by him on the half-yearly balance of a tax-collector's account, in which his own and the Crown monies are blended together. Also to recover the amount of a banker's promissory note in the hands of a tax-collector, and received by him in payment of taxes.

M. D. HILL moved for a rule calling on her Majesty's *Attorney-General* to show cause why two writs of extent in chief, issued against Adams and Warren, should not be set aside. It appeared that Adams and Warren were bankers at Shrewsbury, having also a branch Bank at Market Drayton. An account was kept at the Shrewsbury Bank by a tax-collector, of the name of Onions, in which his own private monies and the monies paid to him for taxes were blended together. The bankers were in the habit of balancing this account half-yearly, and they allowed Onions from time to time interest on the receipts over the payments at each half-yearly balance. On the 4th November, 1847, an extent issued for the recovery of this interest, as well as the money received by Onions for taxes. An account was kept at the Market Drayton Bank by a tax-collector of the name of Moore, who had received, in payment of taxes, several promissory notes of Adams and Warren, payable to bearer on demand. These notes were still in the possession of Moore; and on the same 4th November another extent issued against Adams and Warren for the recovery of their amount, as well as other monies received by Moore for taxes, and by him paid into the Market Drayton Bank. The present application was made on behalf of the assignees of Adams and Warren, against whom a *fiat* in bankruptcy issued on the 8th November, 1847. It is conceded, that, after the case of *Rex* v. *Ward* (2), the extent cannot be successfully impeached so far as relates to the money received on account of taxes; but it is submitted, first, that the Crown is not entitled to recover the interest allowed to Onions on the half-yearly

(1) Followed in *In re West London Commercial Bank* (1888) 38 Ch. D. 364, 57 L. J. Ch. 925.—J. G. P.

(2) *Post*, p. 604.

balance, *inasmuch as interest is a matter of contract between the bankers and their customer.

REG. v. ADAMS. [*300]

(POLLOCK, C. B.: It may be difficult to trace the money of the Crown, when once mixed up with the general funds of any person; but still it may be followed wherever the evidence leads. If so, its proceeds may also be followed; for instance, if an estate were purchased, the crops might be taken; or if stock were bought, the dividends might be taken. In like manner, if money paid for taxes is deposited with a banker, whose practice it is to pay interest on the floating balance, the Crown is entitled to that interest.)

Secondly, an extent cannot issue in respect of the promissory notes. These notes have never been brought into the account between the bankers and the tax-collector; and the effect of this extent would be to give him a preference over other creditors, since the Crown would be paid in full. The tax-collector was not bound to take these notes, but might have insisted upon money; not having done so, he has no claim beyond the other creditors. Suppose the bankers were utterly without effects, the tax-gatherer must pay the Crown; if the tax-gatherer were insolvent, his assignees would only stand in the position of any other creditor, and prove against the bankrupt's estate. This proceeding is a mode of evading the 57 Geo. III. c. 117, by turning that which ought to be an extent in aid into an extent in chief.

(PLATT, B.: You ought to plead to the extent.)

Rex v. *Shackle* (1) is an authority to show that the Court will interpose on motion.

POLLOCK, C. B.:

There ought to be no rule. The first point is, whether the Crown is entitled to the interest allowed by the bankers on money deposited with them by a tax-collector; and we are all clearly of opinion that the Crown is so entitled.

The other point is, whether an extent in chief lies to enforce the payment of notes issued by a country Bank payable to bearer, and received by a collector from a tax-payer. We are of opinion, that, immediately the notes were paid to the collector, they became a debt due to the Crown, and that an extent might issue against the [301]

(1) 11 Price, 772.

REG. v. ADAMS.

bankers for the purpose of enforcing payment. If the notes are paid over by the collector to the bankers after their bankruptcy, that is a matter of pleading, but cannot affect the extent on motion.

PARKE, B.:

The notes are received by the collector as payment to the Crown, and the Crown may adopt that, and obtain all the rights of suing on the notes. The bankruptcy and assignment do not afford any ground for setting aside the extent.

PLATT, B., concurred.

Rule refused.

1837. *Jan.* 28.

[301, *n.*]

REX *v.* WARD (1).

(2 Ex. 301, *n.*—303, *n.*)

A tax-collector was accustomed to pay monies received on account of taxes to R., who paid the same into his banker's to his private account. with knowledge of the banker that the same were blended with the monies of R. The banker having become insolvent: Held, that an extent in chief might issue against him for the recovery of the Crown monies, the amount being a question for a jury.

SIR W. FOLLETT (on the 21st November, 1836) moved for a rule calling on his Majesty's *Attorney-General* to show cause why a writ of extent in chief, issued against one Ward, for recovering the sum of 1,038*l.*, and all proceedings had thereon, should not be set aside.

The extent issued on the 7th November, 1836, upon the affidavit of Richard Rixon, a collector of taxes, stating that Ward, carrying on the business of a banker at Woolwich, in Kent, was indebted to his Majesty in the sum of 1,038*l.*, arising from the rates and duties collected and received by the said Richard Rixon from the inhabitants of Woolwich, and deposited with Ward for safe custody until payment to the Receiver-General of Stamps and Taxes; that Ward was insolvent, and had stopped payment as a banker, by reason whereof the said sum was in danger of being lost, &c. The present application was made on behalf of the official assignee of Ward, against whom a *fiat* in bankruptcy issued on the 8th November,

[*302, *n.*]

1836, and was supported by the joint affidavit of the assignee *and Ward, the latter of whom deposed, that Richard Rixon never kept any account, nor had any dealing or transaction with him; that an account had for several years past been kept with deponent, as

(1) Followed in *In re West London Commercial Bank* (1888) 38 Ch. D. 364, 57 L. J. Ch. 925.—J. G. P.

a banker, by John Rixon, the father of Richard Rixon, and that such account was kept in the name of John Rixon only, and as his private account; that when any monies were paid in to the account kept by John Rixon, they were generally paid in by John Rixon himself, and no part of the money paid in to such account was distinguished from any other part, but the same were all paid in to and blended together in one account; that all cheques drawn on deponent in respect of the monies so paid in were signed by John Rixon, and John Rixon drew on deponent from time to time for the same, as he, the said John Rixon, thought fit. The official assignee deposed, that he had examined the books of account kept by Ward, and that the only account appearing therein kept with any person of the name of Rixon was headed "John Rixon."

The COURT being of opinion that the affidavit of Ward was defective, in not stating that he did not know that any part of the money belonged to the Crown, an additional affidavit was filed, wherein Ward deposed, "that he never had notice, nor did he ever positively know that the monies paid into his hands by John Rixon, or any part thereof, belonged to his Majesty, although he certainly did believe that some part of the monies so paid into his hands by John Rixon might have been originally received for taxes; but what amount thereof, or what particular monies were or was so received, the deponent never had the slightest idea."

The *Attorney-General* showed cause, (January 28, 1837), upon affidavits, that John Rixon had formerly been the collector of taxes; and that Richard Rixon, his son, who succeeded him, was in the habit of paying the money received on account of taxes to his father, who paid it into the Bank to his private account; that Ward knew that some of the money so paid in was received on account of taxes, and used to ask when it would be necessary to have the money ready for the Receiver-General. He cited *Rex* v. *Wrangham* (1) as an authority to show, that Ward, having received the money of the Crown, became an immediate debtor to the Crown.

Sir W. Follett, in support of the rule:

The question is, whether, under the circumstances, an extent in chief can issue against the banker, who kept an account with Rixon, the father, and not with the son.

(PARKE, B.: The law is, that any one is in privity with the

(1) 35 R. R. 753 (1 Cr. & J. 408).

REX v. WARD. [*303, *n.*]

Crown who knows that the money which he receives is the money of the Crown; therefore, an extent in chief may issue *for all sums which the banker received, knowing them to be the monies of the Crown.)

The banker had no knowledge that any particular sums belonged to the Crown, but only that money received for taxes was paid in by Rixon, the father, together with his own money.

(PARKE, B.: That would be a question of fact, on comparing the extent of these transactions with the amount paid in. If the transactions of the customer were very small, and those of the Crown very large, a jury might come to the conclusion that the whole belonged to the Crown.)

Per CURIAM (1):

The rule must be discharged.

1848. *May* 9.

[303]

BELCHER AND OTHERS *v.* BELLAMY AND ANOTHER (2).

(2 Ex. 303—311; S. C. 17 L. J. Ex. 219.)

H., residing in Australia, was indebted to A. in 771*l.* 3*s.* 4*d.* On the 8th January, 1844, A., *bonâ fide*, and for a valuable consideration, assigned the debt to W., and on the 22nd January joined W. in a letter notifying to H. the assignment, and requiring him to pay the debt to W. This letter was posted on the 1st February, 1844, in the ordinary way in which letters to New South Wales are posted, and could not have reached Australia until after the 10th February, on which day a *fiat* in bankruptcy issued against A. On the 29th January, 1844, H. remitted, by letter, 50*l.*, which was received after the *fiat* and delivered over to W. The assignees of A. having sued W. for the amount: Held, that, W. having taken every possible step to obtain possession of the debt, it could not be said to remain in the order and disposition of the bankrupt, with the consent of the true owner, within the meaning of the 72nd section of the 6 Geo. IV. c. 16 (3).

ASSUMPSIT against the defendants, as executors of N. Winsland, deceased, for money had and received by Winsland in his lifetime for the use of the plaintiffs as assignees. The defendants pleaded that they did not promise; and issue having been joined thereon, the following case was, by consent, stated for the opinion of this Court:

In 1843, before the bankruptcy of Hannen, R. D. Hawkins,

(1) Lord ABINGER, C. B., PARKE, B., and GURNEY, B.

(2) Cited in *In re Watson & Co.* [1904] 2 K. B. 753, 73 L. J. K. B. 854, C. A.

(3) See now s. 44 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).—J. G. P.

residing at Port Adelaide, in South Australia, was indebted to the bankrupt in 771*l.* 3*s.* 4*d.*, being the debt referred to in the letter of the said N. Winsland, of the 22nd January, 1844, which debt is not yet wholly paid. In 1843, the bankrupt directed Hawkins to make his remittances on account of this debt to the bankrupt's son, J. Hannen, jun.

Afterwards, and before the bankruptcy, viz. on the 8th *January, [*304]
1844, the bankrupt, *bonâ fide*, and for a valuable consideration, by deed, assigned to the said N. Winsland the debt due from Hawkins, and all his, the bankrupt's, interest therein, so far as he could by deed assign the same. On the 1st February, 1844, and before the bankruptcy, N. Winsland posted, in the ordinary way in which letters to New South Wales are posted, a letter to Hawkins, with the concurrence of the bankrupt, signed by him at the foot thereof, of which letter and concurrence the following are true copies:

"To Mr. R. D. HAWKINS, Adelaide, New South Wales,—I, the undersigned Nicholas Winsland, &c., hereby give you notice, under and by virtue of a certain indenture bearing date the 18th of January instant, and made between James Hannen therein described of the one part, and myself of the other part, certain goods, or the proceeds thereof, and all monies now due, or to become due, from you to the said James Hannen in respect thereof, amounting to 771*l.* 3*s.* 4*d.*, were assigned and transferred to me, the said Nicholas Winsland. And I give you further notice, and require you to make all further remittances on account of the said goods or monies to me or to my credit at my bankers', Coutts & Co., Strand, London, whose acknowledgment will be your sufficient discharge. Dated this 22nd day of January, 1844.

"NICHOLAS WINSLAND.

"Witness, JOHN BURDER," &c.

"I concur in the above notice. Dated this 22nd day of January, 1844.

"JAMES HANNEN.

"Witness, JOHN BURDER, WILLIAM GOZZARD."

The *fiat* issued on the 10th February, 1844. The letter could not have reached Port Adelaide by that day; and Hawkins had no notice of the assignment at the date of the *fiat*, nor at the date of the bill hereinafter mentioned; nor could any other letter have reached Port Adelaide on or *before the 10th February, if the same had [*305]
been regularly posted on the said 8th January, 1844; nor could the

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said N. Winsland by any means have communicated to the said Hawkins, or have given him notice of the aforesaid assignment, or the fact of the execution of the aforesaid deed, before the issuing of the said *fiat*, or the date of the said bill hereinafter mentioned. Save as aforesaid, nothing had been done to prevent the debt from being in the reputed ownership of the bankrupt.

On the 29th January, 1844, a bill for 50*l.* was remitted to the bankrupt's said son, James Hannen, jun., in a letter from Hawkins, which was received by the bankrupt's said son after the issuing of the *fiat*, and after he had notice from the said N. Winsland of the aforesaid assignment from the bankrupt. The letter stated that the inclosed bill for 50*l.* on the Bank of South Australia was in favour of J. Hannen, jun.; and the bill was remitted to him, and received by him in pursuance of the direction aforesaid, on account of the debt due from the said R. D. Hawkins. On receiving this bill of exchange, J. Hannen, jun., having been indemnified by N. Winsland, inclosed and delivered the bill to him, and the amount thereof was received by the said N. Winsland.

The Court was to be at liberty to draw any inference of fact that a jury might draw.

The question for the opinion of the Court was, whether the assignees were entitled to recover the proceeds of the bill from the defendants, as executors of the said N. Winsland. If they were, then the defendants were to withdraw their plea, and judgment by default was to be entered for the plaintiffs, with damages 50*l.*, with interest at 5*l.* per cent. from the 16th September, 1844, by confession. If not, a *nolle prosequi* was to be entered.

Bramwell, for the plaintiffs:

The case falls within the 72nd section of the Bankrupt Act, 6
[*306] Geo. IV. c. 16, which *is an extremely beneficial clause, having for its object the preventing traders from obtaining false credit by the apparent ownership of property. The enactment is, indeed, qualified by a statement that the reputed ownership shall be with the consent of the true owner; but that means a permissive occupation not contrary to his consent. In this case, the defendants' testator consented; for he took an assignment of the debt with full knowledge that the bankrupt must remain for some months the reputed owner of it.

(POLLOCK, C. B.: The fallacy of your argument lies in assuming that he consented because he put himself in the situation of being

the true owner. But when he consented, he was not the true owner; and as soon as he became so, he dissented.)

If goods once vested in the purchaser be allowed to remain in the possession of the vendor for any time, however short, they will, in the event of his bankruptcy, pass to the assignees. * * *Livesay* v. *Hood* (1) decided that goods in the hands of a *retail dealer upon sale or return passed under a commission of bankruptcy against him by the 21 Jac. I. c. 19.

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(PARKE, B.: The cases relating to the assignment of goods abroad have always turned upon whether the assignee has done all in his power to get possession of the property. In *Brown* v. *Heathcote* (2), a debtor assigned to his creditor certain goods in two ships then at sea, and delivered to him the bills of lading and invoice; and the debtor having become bankrupt, it was held, that, as everything which could show a right to the goods was delivered over to the creditor, the bankrupt could not be said to have the order and disposition of the goods. Your argument amounts to this, that goods at sea can never be purchased so as to defeat the claim of the assignees, in the event of the vendor becoming bankrupt. But, in general, there exist some *indicia* of property, as bills of lading, &c. In fact, your argument goes to this length, that no goods at a distance could be safely purchased at all.)

The purchase of the debt, with knowledge that it must of necessity remain for some time in the order and disposition of the bankrupt, is of itself a consent. Suppose the deed of assignment had contained a covenant not to give notice to the debtor for three months; according to the argument on the other side, that would not have been a consent, because the debtor could not possibly receive notice of the assignment within that period. The fallacy is in supposing that there must be a continuing consent. (He cited 1 Mont. & Ayr., Bankrupt Law, 854; *Lingard* v. *Messiter* (3); *Fletcher* v. *Manning* (4).]

Peacock appeared to argue for the defendants on the 8th May, the plaintiffs' counsel being then absent; and, after citing *Burn* v. *Carvalho* (5), *Load* v. *Green* (6), and *Fletcher* v. *Manning*, was stopped by the COURT.

(1) 11 R. R. 669 (2 Camp. 83).
(2) 1 Atk. 160.
(3) 1 B. & C. 308.
(4) 12 M. & W. 571.
(5) 48 R. R. 213 (4 My. & Cr. 690).
(6) 71 R. R. 627 (15 M. & W. 216).

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POLLOCK, C. B.:

It is probable that this clause of the statute was not intended to apply to debts, but only to cases in which there was a visible possession and apparent ownership of property, which gave to the trader the semblance of wealth, and so enabled him to obtain credit. But, since the case of *Ryall* v. *Rolle* (1), it is too late to doubt whether debts are within the enactment. The question as to debts has never received the same consideration as that of goods and chattels, because in reality no man has an apparent ownership of debts, or obtains credit by means of them, since debts are generally unknown. The question as to debts has chiefly arisen in cases of assignments of debts, bonds, and policies of assurance, where upon the assignment no notice has been given; and it has been held that the debts still remained in the order and disposition of the bankrupt, with the consent of the true owner. No doubt the Statutes of Bankruptcy passed with a view to a different state of things from that which now prevails; and, if we were called upon for the first time to put a construction on those statutes, it may be that we should not concur in all the decisions. I differ from *Mr. Bramwell* in opinion that this is an extremely beneficial clause, and one to be enforced in every case. It would very much paralyse commercial transactions, if it were necessary that every transfer of the property in goods should be accompanied by an instantaneous delivery. The modern rule is, that goods are not deemed to be in the possession of a trader, with the consent of the true owner, if the latter takes every possible pains to obtain possession of them. The question then is, whether the true owner in this case consented to the goods remaining in the possession of the bankrupt. He certainly did not; for, immediately he became owner, he took every possible step to give effect to the assignment—namely, by sending notice to the debtor; but before the notice arrived, *the assignor of the debt became bankrupt. It is argued, that, because the plaintiff took an assignment of the debt, he consented to its remaining with the bankrupt. I cannot agree to that. The assignee took the debt with a right to claim it *instanter*, and he does so, as far as time and space will permit. Our judgment must, therefore, be for the defendant.

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PARKE, B.:

I am of the same opinion. I concur in the observations of the LORD CHIEF BARON with reference to the Statutes of Bankruptcy. In

(1) 1 Atk. 165; *S. C.* 1 Ves. 348, nom. *Ryall* v. *Rowles*.

the first instance, they were not supposed to apply to choses in action. That, however, was settled by the case of *Ryall* v. *Rolle*. It cannot be doubted that the bankrupt law was originally made when commerce was in a very different state from the present, and that at this period the Legislature would not enable a bankrupt to pay his debts with the goods of another person. Whatever may have been the state of commerce in the time of James I., it is evident that, at the present day, a trader does not obtain credit by the possession and apparent ownership of other persons' goods, but in consequence of his general estimation as a merchant. However, be that as it may, we must construe the Bankrupt Act as it stands, and then it is clear that the present case is not within its provisions. In order to be so, there must be a real owner, distinct from the apparent owner, and the real owner must have consented that the trader should have possession of the goods. There cannot be a better explanation of the statute of James (1) than the judgment of Lord REDESDALE in the case of *Joy* v. *Campbell* (2), where, in construing a similar clause in the Irish Act (11 & 12 Geo. III. c. 8, s. 9), he states it to mean, "Where the possession, order, and disposition is in a person who is not the owner, to whom the goods do not properly belong, and who *ought not to have them, but whom the [*310] owner permits, unconscientiously as the Act supposes, to have such order and disposition. The object was to prevent deceit by a trader, from the visible possession of property to which he was not entitled; but in the construction of the Act the nature of the possession has always been considered, and the words have been construed to mean, possession of the goods of another, with the consent of the true owner." Apply that to the present case. The real owner was the defendant, to whom the debt was assigned. The assignment bound the assignor in equity; and when the defendant had taken all proper steps to obtain possession of the debt, he became entitled to it, both at law and in equity; and the bankrupt's assignees could not claim it, unless the defendant had unconscientiously permitted it to remain in the possession of the bankrupt. It appears, however, that he could not prevent it, and that everything was done that could be done, so that it is impossible to say the real owner consented to the bankrupt retaining possession. In *Load* v. *Green* (3), trover was brought for goods obtained by a party, afterwards bankrupt, with the fraudulent intention of never

(1) 21 Jac. I. c. 19, s. 11.
(2) 9 R. R. 39 (1 Sch. & Lef. 336).
(3) 71 R. R. 627 (15 M. & W. 216).

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paying for them, and that was held sufficient to prevent the operation of the statute. According to *Mr. Bramwell's* argument, in all cases where there is a purchase of goods, under such circumstances that the vendee cannot possibly have immediate possession, he consents to their remaining in the possession of the vendor. If that argument were correct, the effect would be to prevent any assignment of goods abroad, and all commerce with respect to such goods must be at an end. The case suggested, of an assignee of a debt binding himself not to give notice to the debtor within a certain period, might be a case of possession by the debtor with the consent of the true owner, because during the stipulated time he [*311] absolutely precludes *himself from taking any step to prevent the debt from remaining in the order and disposition of the bankrupt. That point, however, it is unnecessary to decide. Here, the moment the assignment took place, the assignee of the debt used every means in his power to obtain possession of it.

ROLFE, B.:

I am of the same opinion. The 72nd section enacts, "that, if any bankrupt, at the time he becomes bankrupt, shall, by the consent and permission of the true owner thereof, have in his possession, order, or disposition any goods or chattels, whereof he was reputed owner," they shall pass to his assignees. Now, it is quite clear that the "consent and permission" there spoken of is something which must be proved, not to be inferred from the mere fact of nothing being done. Were it not for the decisions, I should have thought it extremely doubtful whether a debt could be said to be left in the order and disposition of a bankrupt, with the consent of the true owner; but the doctrine in *Ryall* v. *Rolle* has prevailed so long, that we are bound by it: therefore a person, purchasing a chose in action, is considered to leave it in the possession of the debtor, unless he is active and gives notice; although, if he takes every possible step to give notice, and the debt nevertheless remains in the possession of the bankrupt, it does not so remain with the consent and permission of the purchaser. If, as suggested by *Mr. Bramwell*, he does not give notice for three months, during that period the debt remains in the order and disposition of the debtor; but the moment he gives notice, it is otherwise; and the fact, that many months must elapse before the notice can take effect, does not alter the case.

PLATT, B., concurred.

Judgment for the defendants.

CALDWELL AND OTHERS *v.* BECKE (1).

1848. *April* 20.

(2 Ex. 318—320.)

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A joint and several covenant by A. and other persons, that "they or some or one of them" will pay a certain sum, may be declared upon as a covenant by A. to pay, and debt will lie on such a covenant.

DEBT. The declaration stated, that on the 30th August, A.D. 1845, by a certain indenture then made by the defendant (*profert*), the defendant did, for himself, his heirs, executors, &c., covenant with the plaintiffs, their executors, &c., that he, the defendant, would pay to the plaintiffs, their executors, &c., the sum of 250*l.*, and interest thereon at the rate of 5*l.* per cent. per annum, on the 30th August then next, that is to say, on the 30th August, A.D. 1846, without any deduction whatsoever, *prout patet*, &c. Averment, that, although the plaintiffs have performed all things in the indenture on their part to be performed, and although the 30th August, A.D. 1846, elapsed before the commencement of the suit, yet the defendant did not, on the 30th August, A.D. 1846, or at any time, pay to the plaintiffs the said sum of 250*l.* and interest &c.

The defendant pleaded *non est factum*, after setting out on *oyer* the indenture, which was made the 30th August, A.D. 1845, between Francis Augustus Burdett Bonny, (thereinafter, for the sake of brevity, styled "the said borrower"), of the first part; William Ralfs, William Bonny, and George Becke, of the second part; and Frederick Caldwell, Henry Chilton, and Frederick Fuller, of the third part. After reciting, that "by a policy of assurance of the English and Scottish Law Life Assurance and Loan Association, the funds of the Association were charged with the payment to the executors, &c. of the said borrower of 500*l.* within three months after proof of his decease;" also reciting, that "the said borrower had agreed with the said parties thereto of the third part for the loan of 250*l.* on the security of an assignment of the said policy, and also by the joint and several covenants of the said borrower, and of the said parties thereto of the second part:" it was witnessed, that, in consideration of 250*l.* to the said borrower paid by *the [*319] parties of the third part, the said borrower, &c., assigned to them the policy, with a proviso for redemption on repayment of 250*l.* and interest. The following was the covenant on which the action was brought: "And the said borrower, and, as his sureties, the said parties hereto of the second part, do hereby, for themselves, their

(1) See *Coope* v. *Cresswell* (1866), L. R. 2 Ch. 112, 119; *S. C.* 36 L. J. Ch. 114.—J. G. P.

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heirs, executors, and administrators, jointly and severally covenant with the said parties hereto of the third part, their executors, administrators, and assigns, that they the said parties hereto of the first and second parts, or some or one of them, their or some or one of their executors, administrators, or assigns, will pay to the said parties hereto of the third part, their executors, administrators, or assigns, the said sum of 250*l.* and interest as aforesaid, on the 30th day of August next, without any deduction whatsoever."

At the trial, before Pollock, C. B., at the Middlesex sittings after last Hilary Term, it was objected, on the part of the defendant, that there was a variance between the covenant set out in the declaration and that contained in the indenture; also that debt would not lie on this covenant. The learned Judge directed a verdict for the plaintiffs, reserving leave for the defendant to move to enter a nonsuit.

Martin now moved accordingly:

There is either a variance, or debt will not lie. The covenant contained in the indenture is not an absolute covenant to pay, but a collateral covenant that the defendant and the parties of the second part, or some one or other of them, shall pay. In *Harrison* v. *Matthews* (1), the declaration stated that, by an indenture made between J. H. of the first part, the defendant of the second part, W. A. the elder of the third part, W. A. the younger of the fourth part, and the plaintiff of the fifth part, the defendant covenanted with the plaintiff, that they, the defendant, the said J. H., W. A.
[*320] the elder, *and W. A. the younger, or some or one of them, should or would pay or cause to be paid unto the plaintiff 300*l.*; and that was held a collateral covenant, and that the action for the recovery of the money ought to be in covenant, and not in debt.

(PARKE, B.: There the covenant was by the defendant, that he and three other persons, not parties to the indenture, or some or one of them, would pay.)

The legal effect of this covenant is improperly stated in the declaration: the breach should have been, that neither the defendant and the parties of the second part, or any one of them, paid.

(PARKE, B.: The covenant is by the defendant and other persons,

(1) 10 M. & W. 768.

that they, "or some or one of them," shall pay; and that is declared upon as a covenant that the defendant would pay. *Addison* v. *Gibson* (1) shows that to be no variance.)

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Rule refused.

FAVIELL *v.* THE EASTERN COUNTIES RAILWAY COMPANY (2).

1848. *May* 11, 26.

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(2 Ex. 344—351; S. C. 6 Dowl. & L. 54; 17 L. J. Ex. 223.)

A writ having issued in an action of debt against an incorporated railway company, the defendants' attorney consented to a Judge's order referring to arbitration "the claims of the plaintiff in the action." The plaintiff claimed, before the arbitrator, a sum for extra work occasioned by the defendants' breach of covenant in not giving the plaintiff possession of certain land at a stipulated time. The arbitrator entertained this claim, though objected to, and awarded the plaintiff a sum in respect of it. The Court having refused to set aside the award: Held, (on motion to enforce it under the 1 & 2 Vict. c. 110 (3)), first, that if the matter in dispute were not within the jurisdiction of the arbitrator, the defendants should have applied to the Court to revoke the submission; but not having done so, and the plaintiff having set up this matter as "a claim in the action," and the arbitrator having so decided in respect of it, his award was binding, however erroneous.

Secondly, that the submission was valid, though the attorney had no authority, under seal, to defend or refer the cause.

MARTIN moved for a rule calling on the plaintiff to show cause why the award made in this cause should not be set aside. In the year 1841, the plaintiff entered into a contract under seal with the Eastern Counties Railway Company for the construction of certain portions of their line at a stipulated price, and according to certain drawings, plans, and specifications. The deed contained a clause that the plaintiff should not be entitled to charge for any alteration or addition, unless made under the sanction of a note in writing signed by two of the directors of the Company. The deed also contained a covenant by the Company to deliver possession of certain land to the plaintiff within a specified *time, for the purpose of executing his contract. A portion of the work consisted of an extensive embankment, which the nature of the soil rendered difficult and expensive to construct, and which, as the plaintiff alleged, was rendered the more so by reason of the defendants having failed to put him in possession of the land at the stipulated

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(1) 10 Q. B. 106.

(2) See *Kirk and Randall* v. *East and West India Dock Company* (1886) 55 L. T. N. S. 253.

(3) The Judgments Act, 1838; see s. 18. This procedure is now obsolete, the same result being achieved by s. 12 of the Arbitration Act, 1889.—J. G. P.

FAVIELL v. EASTERN COUNTIES RAILWAY CO.

time. The plaintiff proceeded with the work, and sent in a claim of 10,307*l.* 0*s.* 1*d.* for extra expenses incurred by him in the execution of his contract, by being, as he alleged, delayed by the Company in getting possession of the land. This claim having been disallowed, the plaintiff brought the present action of debt for work and labour, to recover that sum, together with a portion of the stipulated price, amounting in the whole to about 15,000*l.* The writ was tendered to the defendants' attorney, who thereupon consented to refer the matter to a legal arbitrator, and a Judge's order was drawn up, by which "the claims of the plaintiff in this action, and the set-off of the defendants' therein," were alone referred. It was urged before the arbitrator, that the plaintiff was not entitled to recover in this action of debt the amount of the extra work occasioned by the non-delivery of the land, and that his only remedy was by action for damages for the breach of covenant. The arbitrator, however, received evidence of the extra work, and awarded "that the plaintiff was entitled to recover, in respect of his said claim, the sum of 14,410*l.* 0*s.* 7*d.*, and that the defendants were entitled, in respect of their set-off in the said action, to the sum of 1,820*l.* 11*s.*, and that the plaintiff was entitled to recover the balance, the sum of 12,589*l.* 9*s.* 7*d.*" The defendants' attorney deposed, that he had no authority under the seal of the Company to sign the consent to the reference, but was only verbally authorised by the chairman of the directors, and that he had no warrant to defend made out or executed in any way, and that there was no entry of record ever made in respect of any such warrant.

[346] *Martin:*

The arbitrator has exceeded his jurisdiction. The submission was solely of claims in an action of debt; but the arbitrator has awarded the plaintiff the extra expenses, which could only be recovered as damages in an action of covenant.

(POLLOCK, C. B.: The arbitrator may have made a mistake in point of law; but that is no ground for setting aside the award.

PARKE, B.: If the arbitrator had found in terms that the plaintiff was entitled to so much damages, the award would have been void as to that. The question here was, whether the sum claimed for extra work was a debt, and the arbitrator finds it was.)

The arbitrator's attention was called to the nature of the claim, and he persisted in receiving the evidence.

(POLLOCK, C. B.: Then you might have applied to the Court or a Judge to revoke the submission.)

A reference of all debts does not give the arbitrator any jurisdiction over damages.

(PARKE, B.: It is simply the case of an erroneous decision; and if parties choose to refer a matter to a Judge of their own selection, they are bound by his decision, both in fact and law. The fallacy lies in assuming that the arbitrator has exceeded his jurisdiction.)

Martin then moved to set aside the order of reference:

The Company, being a corporation, could not become parties to a reference, except by submission under their common seal. An order of reference is a mere agreement between the parties, sanctioned by a Judge, and only differs from an ordinary agreement insomuch as it may be made a rule of Court, and its performance enforced in a more summary way than by action.

(POLLOCK, C. B.: The same objection would apply to an order of Nisi Prius; so that, according to your argument, a corporation could never refer a case after the jury were sworn.

PARKE, B.: By usage, an attorney may refer a case in which he is employed as attorney.)

Here there is a further objection, that the attorney himself was not appointed under seal.

(POLLOCK, C. B.: If you are right, you do not want our assistance. *In any attempt to enforce the award, you can defend yourself on these grounds. If we were to set aside the award, we should deprive the plaintiff of the opportunity of having the matter settled by a court of error.) [*347]

Rules refused.

Knowles, for the plaintiff, obtained a rule under the 1 & 2 Vict. c. 110, calling on the defendants to show cause why they should not pay to the plaintiff 12,589*l.* 9*s.* 7*d.*, the sum awarded to him.

Martin, *Willes*, and *Prentice* showed cause in Trinity Term (May 26):

The Court will not enforce the award in a summary manner, but will allow the defendants an opportunity of raising the objection by

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plea. An arbitrator cannot give himself jurisdiction by improperly deciding upon a matter not submitted to him. In that respect, there is no difference between an arbitrator and an inferior Court: *Roberts* v. *Humby* (1). * * This proceeding is a substitute for the remedy by attachment, and is governed by the same rules, and no attachment can be granted against a corporation.

Secondly, there was no valid submission. Prior to the rules of Hilary Term, 4 Will. IV. ss. 4, 15, warrants of attorney to sue or defend must have been entered of record. A corporation cannot appear to an action, except by warrant of attorney, under the corporate seal: *Rex* v. *The City of Chester* (2). In Plowden, 91, it is expressly laid down, that a corporation "cannot appear by bailiff, without having a warrant in writing." This is the case of an unauthorised appearance by an attorney, and is distinguishable from *Bacon* v. *Du Barry* (3), inasmuch as there the attorney had himself executed the arbitration bond. *Filmer* v. *Delber* (4) is the only decision that an attorney may refer a cause against the express direction of his client; and it is contrary to all principle that an agent should have power to bind his principal by a contract which the latter has forbidden.

(PLATT, B.: As between attorney and client, you may be right; but surely an attorney, duly appointed, has authority to bind his client as to third persons.

ALDERSON, B.: How is the other side to know whether the attorney has authority or not? In *Bayley* v. *Buckland* (5), the Court

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laid down the rule, that, where a *defendant had notice of the action, and an attorney, without authority, appeared for him, the proceedings would not be set aside; otherwise if the defendant had no notice. The principle of that case governs this.)

Biddell v. *Dowse* (6) shows that a submission by an attorney, who appeared for an infant, is void.

(ALDERSON, B.: In that case there was no consent by the infants, or any person representing them, for they could not appoint an attorney.)

The *Attorney-General*, in support of the rule, called the attention of the Court to certain parts of the affidavits, by which it

(1) 49 R. R. 435 (3 M. & W. 120).
(2) 2 Show. 366; 1 Skin. 154.
(3) Carth. 412.
(4) 12 R. R. 688 (3 Taunt. 486).
(5) 74 R. R. 573 (1 Ex. 1).
(6) 28 R. R. 574 (6 B. & C. 255).

appeared that the sum in dispute was claimed by the plaintiff, in his particulars, as a debt due in the action. (He was then stopped by the COURT.) As to the second point, he argued that, the attorney having described himself in the affidavits as such, it must be taken that he was properly appointed, and that he had authority to bind the corporation by any act done by him in the conduct of the suit.

POLLOCK, C. B.:

The only arguable point is whether the arbitrator has exceeded his jurisdiction in awarding compensation to the plaintiff in respect of his claim for extra work. This is said to be a fit matter for the decision of the Court, upon the question being raised by plea. But the arbitrator has already decided that this claim is a debt. If, indeed, on a reference of all claims in an action of debt, the arbitrator were to entertain a claim for damages in an action of assault or criminal conversation, probably the Court, if the subject were brought before them, would not allow the reference to proceed; but upon the facts now before us the question is not whether the arbitrator has exceeded his jurisdiction, but whether he has decided the matter in dispute. The question before him was, whether *this [*350] claim for extra work was a claim in the action, or mere damages; the reference goes on, and the arbitrator comes to the conclusion that it is a claim in the action, and that the plaintiff is entitled to a certain sum in respect of it. Whether correctly or incorrectly, he has decided the matter, and his award is conclusive.

ALDERSON, B.:

I am of the same opinion. I was at first struck by the argument, that the extent of the arbitrator's jurisdiction could not be interpreted by his own judgment, and I still think so. But here the arbitrator had a general jurisdiction over the matter, because the reference was of the plaintiff's "claims in the action," and the plaintiff claimed this amount of damages as a debt. He may be wrong in his view, and the arbitrator also wrong in taking it into consideration; but when the defendants saw the arbitrator entertaining a question which he ought not to entertain, it was their duty to interpose and apply to a Judge, for the purpose of being allowed to revoke the submission, which, no doubt, would have been granted, had it appeared by affidavit that the arbitrator intended to exceed his jurisdiction. The question as to the construction of the

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submission would then have been raised before the Judge; but, instead of doing that, the defendants, though they find the arbitrator going on, do not interpose, but make the question one for his determination, and he has determined it. The extent of the arbitrator's jurisdiction is to be taken according to the plain words of the submission, namely, of the "claims" which the plaintiff makes in the action, and this is one.

With respect to the other point, I concur in opinion with the LORD CHIEF BARON. Parties suing a corporation would be grievously injured if they were obliged in all cases to inquire whether the attorney for the corporation was authorised under seal.

ROLFE, B.:

[*351] I am of the same opinion. Let us see what *was referred to the arbitrator. In the language of the affidavit, it is "the claims of the plaintiff in this action, and the set-off of the defendants therein." If, then, the sum in dispute was one of the plaintiff's claims in the action, the objection fails. It is clear, from the affidavits, that the plaintiff claimed a sum of 15,000*l.* for debt, which included this extra work; and after that, it is impossible to say it was not referred to the arbitrator to determine whether or not the claim in question was a debt. The arbitrator has decided that it could be established as a debt, and has awarded accordingly. I also concur as to the other point.

PLATT, B.:

I also think that the rule ought to be absolute. An attorney who has once appeared for a party has jurisdiction over the cause, and may refer it. If the attorney acted without authority, and the client is injured, he has a remedy by action against the attorney. Here the attorney having in fact appeared for the defendants, they are estopped from saying that he was not properly appointed, and having authority to appear, he had also authority to conduct the whole case.

With regard to the other point, when it comes to be understood, it is perfectly plain. The defendants in effect say, "I only refer this claim if you, the plaintiff, can establish it to be a debt." By the judgment of the arbitrator, the plaintiff did establish it to be a debt.

Rule absolute.

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1848.
May 15.

(2 Ex. 352—367; S. C. 17 L. J. Ex. 209.)

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An assessment under the Assessed Tax Acts is final and conclusive, unless appealed against in the manner prescribed by the 43 Geo. III. c. 99, s. 24. Therefore, where a party was assessed to the duty imposed on "horse-dealers": Held, that the decision of the assessor, that the party was a horse-dealer, however erroneous, could not be questioned in an action.

Replevin lies in every case of an alleged wrongful taking of goods.

REPLEVIN of goods and chattels. Avowry, that, on the 5th of April, 1844, and from thence until and on, and to the end of the 5th of April, 1845, and from thence until the end of the 5th of April, 1846, and from thence until and at the said time when, &c., the plaintiff did, in the parish of St. Anne, in the district of St. Anne, &c., exercise and carry on the trade and business of a horse-dealer, and was, during all the times aforesaid respectively, an inhabitant of the said parish, within the district, &c., aforesaid; that, after the 5th of April, 1845, and before the 20th of June in the last-mentioned year, J. S. and E. W., then being the assessors duly appointed according to the several Acts of Parliament passed for levying the several duties of assessed taxes, and relating thereto, and in all respects duly qualified to make the assessments hereinafter mentioned, and having theretofore and after their appointment, to wit, on &c., taken the oath required to be taken by such assessors, before they acted as such assessors, according to the said Acts of Parliament, did make an assessment upon the several inhabitants of the parish of St. Anne, Westminster, *pursuant to the said Acts, [*353] for the year ending the 5th of April, 1846, which said assessment was then, before the said 20th of June, to wit, on &c., duly, and according to the said Acts of Parliament, certified upon oath by the said J. S. and E. W., to, and allowed, according to the directions of the said Acts of Parliament, by J. R. and P. T., then being two of the Commissioners for the affairs of taxes acting for the said district of St. Anne, according to the Acts of Parliament, &c.; that, in and by the said assessment, he the plaintiff, as such inhabitant as aforesaid, and a person so exercising the said trade and business in the said parish, &c., was, by the said J. S. and E. W., then being such assessors as aforesaid, assessed in the sum of 25*l.*, as and for the duties of 22*l.* 10*s.* and 2*l.* 10*s.* payable by horse-dealers, under the

(1) This case turned mainly on the construction of certain sections of the statutes 43 Geo. III. cc. 99 and 161, which were repealed by 43 & 44 Vict. c. 19, s. 4. The case, however, seems to be an authority upon the substituted sections of the last named Act (see Part IV. thereof).—J. G. P.

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48 Geo. III. and 52 Geo. III., for, amongst other things, granting duties payable by persons who should use or exercise the trade and business of a horse-dealer within the cities of London and Westminster, &c.; and also in the further sum of 2*l.* 16*s.* 10*d.*, part whereof, to wit, 2*l.* 10*s.*, was the additional duty of 10*l.* per cent. upon the said sum of 25*l.*—that is to say, such additional duty of 10*l.* per cent. as was granted to our lady the now Queen, by the statute passed in the third year of her reign, for granting to her said Majesty duties of customs, excise, and assessed taxes, and the residue of which said sum of 2*l.* 16*s.* 10*d.* was such additional duty of 10*l.* per cent. granted by the last-mentioned Act upon and in addition to certain other duties, amounting to 3*l.* 8*s.* 9*d.*, in which the plaintiff was duly assessed in and by the said assessment, and to the payment of which, and to be so assessed as aforesaid, he the plaintiff was, according to the said several statutes relating to assessed taxes, liable. The avowry then alleged the payment by the plaintiff of the said sums of 3*l.* 8*s.* 9*d.* and 6*s.* 10*d.*; the due appointment of the defendant, by the Commissioners, as collector of the said duties; the delivery to him of a warrant by the Com-

[*354] missioners, *requiring him to distrain on nonpayment thereof; the demand by the defendant upon the plaintiff of the said duties of 25*l.* and 2*l.* 10*s.*; a refusal by the plaintiff to pay the same, and the taking of the goods and chattels in the declaration mentioned by the defendant as such collector, and by virtue of the said warrant, as and for a distress for the said sum of 27*l.* 10*s.* so in arrear: Verification.

Replication, *de injuriâ.*

At the trial of the cause, a verdict was found for the defendant, by consent, and subject to the opinion of the Court, on the following case.

The avowry was admitted by the plaintiff to be entirely true, except so far as relates to the plaintiff having used or exercised the trade and business of a horse-dealer, or being or having been liable to be assessed for the duty payable by horse-dealers, or persons using or exercising the trade or business of horse-dealers.

The duty was imposed under the provisions of the stat. 48 Geo. III. c. 55, Sched. (H) (1), and 52 Geo. III. c. 93, Sched. (H) (2), whereby it is made payable by every person who shall use or exercise the trade and business of a horse-dealer.

(1) Repealed by Statute Law Revision Act, 1872.

(2) Repealed by 32 & 33 Vict. c. 14, s. 39.

As to the plaintiff's liability to be so assessed, the following were the facts admitted at the trial, and on which the plaintiff contended that he was not liable:

The plaintiff, during the time in respect of which the assessment was made, as hereinafter mentioned, viz. from the 5th of April, 1844, to the 5th of April, 1845, was the proprietor of Aldridge's Repository, in Upper St. Martin's Lane, in the parish of St. Anne, Westminster, and there carried on the business of selling horses and carriages, harness, and other things, for persons upon commission. The repository was open to all persons desirous of selling property of that description; and the general mode of selling was by public auction. These sales took place periodically, viz. once a week in the winter months, and twice in each week in the summer months; and the horses or carriages, *or other property, were [*355] generally sent into the plaintiff's premises a few days previously to the day on which they were to be sold. They were arranged in lots, and catalogues and particulars of sale were printed and distributed; and the property was then put up for sale by public auction by the plaintiff or his manager, upon the premises. If the same was sold, the plaintiff charged the seller a commission of 5*l.* per cent. upon the purchase-money, and also a further sum for the keep of the horses or standing of the carriages or other property until the time of sale. If the same was not sold, the plaintiff charged from 5*s.* to 7*s.* 6*d.* for putting it up by auction, and the keep or standing, as before stated. Where the property was put up for sale, but was not sold by public auction, the plaintiff occasionally sold it after the auction for the owner by private contract, and he then made the same charges as if it had been sold by auction. The number of horses sold by the plaintiff for other persons, between the 5th of April, 1844, and the 5th of April, 1845, otherwise than by public auction, was to that of sales of public auction in the proportion of about three to one hundred.

The plaintiff also occasionally, but very rarely, received horses and carriages and other property from other persons for sale by private contract on their account, but not exceeding six instances in the course of any one year, and he then charged commission as upon a sale by auction, and the keep or standing if sold; and, if not sold, then only the keep or standing to the proprietors of such property. The business carried on by the plaintiff was simply selling horses and carriages and other property, in the way before described, for and as the property of other persons. He did not buy horses

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or carriages, or other property on his own account, in the way of trade or business. The plaintiff's principal business was selling horses and carriages by auction as before mentioned, but he also frequently sold by auction or commission for other persons, being
[*356] the owners thereof, harness and stable *utensils, and the stock of horse-dealers and people employing horses and carriages, and occasionally also leases of the premises on which the business of such persons had been carried on. The plaintiff also, on all his printed posting-bills and catalogues of sales, printed and issued the following notice: "The public is respectfully requested to take notice, that the business of Aldridge's Repository is strictly confined to sales by auction and commission, there being no dealing on the part of the proprietor, nor by any person employed by him, to operate to the prejudice of either buyers or sellers; and that under no circumstances is the practice of misrepresenting the ownership of horses ever resorted to. The days of payment for the proceeds are on Saturdays and Mondays only, upon production of the printed receipt." The plaintiff also, several times in each week, caused advertisements to be inserted in the public daily newspapers to the same effect. The plaintiff, during all the time aforesaid, took out auctioneers' licenses, and paid the duty thereon, for himself and also for his manager, and exercised no other trade or business, as before mentioned.

The plaintiff having declined to pay the assessment, on the ground that he was not liable to the horse-dealers' duty, and having intimated his intention to raise the question of his liability, the seizure in question was made upon his goods, and he thereupon caused the goods to be replevied; and this action was commenced by the plaintiff, in order to raise the question of his liability to be so assessed as in the avowry set forth.

If the Court should be of opinion that the plaintiff was liable to be assessed to the horse-dealers' duty as aforesaid, or, that if not so liable, the avowry could still be supported, the verdict for the defendant was to stand. If the Court should be of a contrary opinion, the verdict was to be entered for the plaintiff, with 5*l.* damages. The Court to be at liberty to draw such inferences of facts as the jury would have drawn; and at the desire of either
[*357] *party, the present case is to be converted into a special verdict, and the inference of facts found by the Court in that case to be stated as facts.

Sir F. Thesiger (*Ogle* and *Bovill* with him) for the plaintiff:

First, it will be objected that, in the present case, the action of replevin cannot be maintained. That objection arises from confounding the act of the sheriff, in giving up the goods, with the action of replevin. Whether the sheriff was right or wrong in returning the goods, the plaintiff is equally well entitled to maintain replevin for their seizure, as he would be to maintain trover or detinue. An action of replevin may be commenced without any return of the goods. *George* v. *Chambers* (1) is a conclusive authority to show that replevin will lie in this case. * * *

(PARKE, B.: You need not argue that point further.)

Secondly, the plaintiff was not liable to be assessed to the duty imposed on horse-dealers. He was neither a horse-dealer in fact, nor within the meaning of the statutes relating to assessed taxes. * * *

(PARKE, B.: Is not the decision of the assessor, that the plaintiff is a horse-dealer, final and conclusive, unless appealed against?) [359]

The 69th and 70th sections of the 43 Geo. III. c. 161, give a right of appeal to the Commissioners against any assessment or surcharge; and, by the 73rd section, the appellants may demand a case for the opinion of a Judge of one of the superior Courts. Those provisions, however, do not exclude the party grieved from his right to maintain replevin.

(PARKE, B.: Your argument would go to this extent—that the validity of every assessment, instead of being supervised by Commissioners, might be tried by Judge and jury.)

Perhaps the Court would interfere if the sheriff replevied, so as to prevent the collector from accounting at the periods fixed by the 43 Geo. III. c. 141, rule 5. The Highway Act, 5 & 6 Will. IV. c. 50, under which the question arose in *George* v. *Chambers* (1), contained a power of appeal, but it was nevertheless held that replevin would lie.

(PARKE, B.: In that case there was an entire want of jurisdiction.)

(1) 63 R. R. 554 (11 M. & W. 149).

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It would be so here, if the plaintiff was not in fact a horse-dealer; and *Charleton* v. *Alway* (1) shows that, in such case, he need not appeal. * * Until the 43 Geo. III. c. 161, s. 73, there was no power of appeal against the assessment itself, but only against a surcharge or overcharge. With regard to the *necessity of appeal, a distinction exists between the assessment of an individual in respect of a particular character which does not belong to him, and his being assessed in respect of property which he does not possess. *Marshall* v. *Pitman* (2) decided, that where a party, having no stock in trade, is rated as an inhabitant of a parish, his remedy is by appeal to the Quarter Sessions, and replevin will not lie. There the party, being an inhabitant and apparently in possession of personal property, was *primâ facie* liable to be rated. But where a party was rated as the occupier of land in a particular parish, when in fact he had no land there, it was held that trespass would lie against the magistrates who granted a warrant of distress: *Weaver* v. *Price* (3). So here, if a party be rated for five horses, when he keeps but one, his only remedy is by appeal; but if he be assessed in respect of a particular trade, which he does not carry on, there is a total want of jurisdiction. Although the 43 Geo. III. c. 99, s. 33, enacts, "that if any question or difference shall arise upon taking any distress, the same shall be determined by the Commissioners of Taxes," an action may nevertheless be maintained for a wrongful distress: *The Earl of Shaftesbury* v. *Russell* (4).

[*360]

(PARKE, B.: Wherever a statute gives to certain persons the power of adjudicating upon a particular matter, their decision excludes all further inquiry. Here it is as if the statute had said, that the assessor shall decide whether or no the party is a horse-dealer; and the assessor having done so, his decision is final and conclusive, unless appealed against in the manner pointed out by the Act: *Brittain* v. *Kinnaird* (5); *Reg.* v. *Bolton* (6).)

The assessor has only power to assess the party being a horse-dealer, not to clothe him with a character which he does not possess. The 43rd section of the 43 Geo. III. c. 161, requires every horse-dealer to enter *in a book an account of the number of horses kept by him, whether for sale or use, and to what duty

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(1) 11 Ad. & El. 993; 3 P. & D. 618.
(2) 35 R. R. 630 (9 Bing. 595).
(3) 37 R. R. 454 (3 B. & Ad. 409).
(4) 25 R. R. 534 (1 B. & C. 666).
(5) 21 R. R. 680 (1 Brod. & B. 432).
(6) 55 R. R. 209 (1 Q. B. 66).

the same are liable, under a penalty of 50*l*. If, then, an assessor should determine that a person is a horse-dealer who in fact is not, such person might be rendered liable to the penalty.

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(PARKE, B.: The assessor's decision is only conclusive *quoad* the assessment; and its effect is to bind the party, unless he appeals, to pay the sum of money set against his name in the schedule.)

Pashley, contrà:

First, replevin will not lie for goods seized as a distress for a debt due to the Crown.

(PARKE, B.: That objection cannot now avail. If a sheriff *propter incuriam*, does replevy, the party grieved may maintain the action.)

Secondly, the decision of the assessor, that the plaintiff is a horse-dealer, not having been appealed against, is final and conclusive. The 43 Geo. III. c. 99, s. 9, requires assessors to bring in their assessments, verified on oath. By the 12th section, the Commissioners are required to sign and seal the assessments. The 24th section enables persons surcharged to appeal to the Commissioners; and the 29th section renders the determination of such appeal final, except where cases are required for the opinion of the Judges. Similar provisions have received a judicial construction in the case of *The Earl of Radnor* v. *Reeve* (1), which arose under the 25 Geo. III. c. 43, the 35th and 38th sections of which statute are identical with the 24th and 29th sections of the 43 Geo. III. c. 99. In that case it was expressly held, that, where a statute declares the judgment of Commissioners of appeal to be final, their judgment cannot be questioned in an action of trespass. The 33rd section of the 43 Geo. III. c. 99, enables collectors to distrain without warrant, on refusal of payment of the duties. The 69th and 70th sections of the 43 Geo. III. c. 161, extend to "any assessment" the right of appeal given by the 43 Geo. III. c. 99, in respect of a surcharge. The words "any assessment," *taken in their plain and ordinary sense, would clearly comprehend the case of a party altogether wrongly rated. The 33rd section of the 43 Geo. III. c. 161, renders every assessment made by the assessors, on the neglect or refusal of any person to deliver lists, final and conclusive, unless they can bring themselves within the exception. *Weaver*

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(1) 5 R. R. 630 (2 Bos. & P. 391).

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v. *Price* (1) is distinguishable from the present case; for there, the plaintiff not being an occupier of any land in the parish, the magistrates were wholly without jurisdiction. So also, in *Charleton* v. *Alway* (2), the plaintiff was assessed to the land-tax in respect of that for which he was not liable to be assessed at all. But, under the circumstances stated in this case, the plaintiff is in fact a horse-dealer. It has been so decided, on appeal to the Judges at Serjeant's Inn.

The COURT then called on

Sir F. Thesiger to reply:

The 24th section of the 43 Geo. III. c. 99, only gives the power of appeal in cases of "overrating"—that is, where a party is liable to be rated, but is rated for too much. *The Earl of Radnor* v. *Reeve* (3) was an action for distraining for one year's duty and surcharge on one male servant, in which case it is conceded that the only remedy is by appeal. That decision comes within the same class as *Marshall* v. *Pitman* (4). The present case is not distinguishable in principle from *Weaver* v. *Price* (1), the one being an assessment in respect of land which the party did not occupy, the other an assessment in respect of a particular character which he did not possess. The party grieved has a right to seek redress in the superior Courts, unless the statutes, in express terms, preclude him from bringing an action.

PARKE, B.:

[*363] I am of opinion that the defendant is entitled *to judgment. The case may be treated as if the allegation that the plaintiff exercised the trade and business of a horse-dealer were struck out of the avowry. The remainder would then show that an assessment was duly made by the defendant, being the assessor of the parish, and that the plaintiff was assessed in a certain sum, which was not paid. We may reject from our consideration the question whether, under circumstances like the present, replevin will lie. That point is settled by the case of *George* v. *Chambers*. The objection is not that the action of replevin will not lie, if a replevin be granted; but that the process of the Crown ought not to have been delayed by a return of the goods. The real question is, whether an action of

(1) 37 R. R. 454 (3 B. & Ad. 409).
(2) 11 Ad. & El. 993
(3) 5 R. R. 630 (2 Bos. & P. 391).
(4) 35 R. R. 630 (9 Bing. 595).

trespass would lie. I am clearly of opinion that it would not. On a careful consideration of these Acts of Parliament, they seem to me to differ from the statute of Elizabeth, as to poor-rate (1), and that the Legislature intended that the assessment of the assessors appointed by the Commissioners should be final and conclusive, unless appealed from, in the first place, to the Commissioners, and further, if necessary, to the Judges of the superior Courts. It would be singular if there were no such provision; for, what a flood of litigation would follow, if every subject of the Crown, who was dissatisfied with the judgment of the assessors, had a right to dispute the propriety of their assessment in an action against the collectors. Actions would be innumerable, juries would have to decide on facts without end, Judges on law, and cases would be carried to the highest tribunal, when the exigencies of the State required a speedy determination. Without referring to the statutes, I should say, *à priori*, that the object of the Legislature was to make the decision of the assessor final and binding, unless disputed in the manner pointed out. On reading the statutes, I come to the same conclusion. *By the 9th section of the 43 Geo. III. c. 99, the Commissioners are [*364] to meet and appoint assessors, who are to bring in their certificates of assessments verified on oath; and the assessors are thereby "required, with all care and diligence, to charge and assess themselves and all other persons chargeable with the said duties." If the language had been, "to charge and assess all such persons as they honestly and *bonâ fide*, after due care and diligence, believed to be chargeable," their assessment would, beyond all question, be final. But though the statute does not, in express terms, say that the assessment shall be conclusive, yet I find, on referring to the 30th section of the 43 Geo. III. c. 161, which enables the assessors to assess persons who neglect or refuse to deliver lists, it is enacted that every such assessment "shall be final and conclusive upon the person thereby charged, who shall not be at liberty to appeal therefrom, unless such person shall prove that he or she was not at his or her dwelling-house or place of abode at the time of delivery of such notice, nor between that day and the time limited for delivering such lists as aforesaid to the assessor, nor unless such person shall allege and prove some other excuse for not having delivered his or her list, as the Commissioners shall, in their judgment, think reasonable and sufficient." In that special case, the Legislature has expressly made the assessment final and conclusive; and unless

(1) 42 Eliz. c. 2

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the party can bring himself within the exception, he has no opportunity of appealing. That being so, if a party, who has an opportunity of appealing, does not avail himself of it, it would be reading the Acts very inconsistently to say that he is not equally bound by the assessment. Let us then look to the power of appeal, which possibly might be framed in such a way as to show that the Legislature did not mean it to be conclusive. This provision is contained in the 24th section of the 43 Geo. III. c. 99, which enacts, "that, if any person shall think himself overcharged or overrated by any assessment or surcharge," &c., "it shall be lawful for him to appeal [*365] to the Commissioners," *&c. It is argued, that the wording of this clause shows that the Legislature meant it to apply only to persons liable to be rated, but rated for too much. Admitting it to be so, and that the word "overrated" has that meaning, then this plaintiff is in the predicament of a person "overrated," since he is clearly liable to part of the rate; for it is stated by the avowry, that he was liable to "other duties amounting to 3*l.* 8*s.* 9*d.*, in which he was duly assessed," and which he paid. It is said that there is a difference between the present case, and that of a person who keeps five horses, and is rated for six; for this plaintiff never carried on the business of a horse-dealer. But I am at a loss to see any difference in principle. It is the same as if a person were rated for six horses and a male servant, or for seven male servants, when in fact he kept no male servant. In either case, he is equally "overrated." I think the word "overrated" in this Act ought not to receive the narrow construction attempted to be put upon it. Though, in its strict sense, "overrating" means, rating for more than ought to be, yet it may also mean rating when the party ought not to have been rated at all. If the latter be not the meaning of the word in the statute, this absurdity would follow, that provision is made for the case of an excess of rating, and none whatever for a rate altogether unjust.

The case of *Weaver* v. *Price* (1), which arose under the Poor-rate Act, 42 Eliz. c. 2, is distinguishable; for that Act only enables the overseers to rate the inhabitants of a parish, and consequently the justices had no jurisdiction to grant a warrant for enforcing a rate assessed on a party who had no land in the parish. Where, however, the party is an inhabitant, and he is rated for too much, the proper course is to appeal, and trespass will not lie. So, with respect to the case of *Charleton* v. *Alway* (2): there, by the terms of

(1) 37 R. R. 454 (3 B. & Ad. 409). (2) 11 Ad. & El. 993.

the stat. 20 Geo. III. c. 17, s. 3, the assessors *were bound to distinguish between the different descriptions of land; and not having done so, and the plaintiff having paid the assessment in respect of a portion of the land, he was entitled to treat the assessment as a nullity. But the case of *The Earl of Radnor* v. *Reeve* (1) is in point. There the COURT said, "that it had been determined by all the Judges of England, that, when a statute provides that the judgment of Commissioners appointed thereby shall be final, their decision is conclusive, and cannot be questioned in any collateral way." In like manner, if a statute gives magistrates jurisdiction to decide on a certain matter, and they, having the facts before them, do decide it, the propriety of their judgment cannot be inquired into, although they may have come to an erroneous conclusion. An assessment not appealed from stands precisely in the same situation as one confirmed after appeal. My judgment, therefore, proceeds as if the allegation, that the plaintiff was a "horse-dealer," were altogether struck out of the avowry. I am by no means prepared to say that the decision of the Judges, as to the construction of the word "horse-dealer" in these statutes, was wrong. If I were forced to give an opinion, it might be in accordance with theirs; but if our decision on the other point be correct, the question does not arise. The verdict will, therefore, stand for the defendant. [*366]

ALDERSON, B.:

I am of the same opinion.

ROLFE, B.:

I am of the same opinion. *Sir Frederick Thesiger* seemed to think it somewhat anomalous, that an assessment in respect of a particular character, in which a party was not liable to be assessed, could not be questioned in an action, inasmuch as the effect would be to enable the officer to give himself jurisdiction. But our decision is not that an assessment made without jurisdiction will bind. *For instance, if an assessor were to assess a person living altogether out of his district, or dealing in something in respect of which the Act did not give any authority to assess him, the assessment might be questioned in an action. By the 9th section of the 43 Geo. III. c. 99, the assessors are to make their assessments "according to the provisions of the laws then in force." But reading that and the other statutes *in pari materiâ*, I cannot feel a [*367]

(1) 5 R. R. 630 (2 Bos. & P. 391).

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doubt but that the Legislature meant to make the decision of the assessor as to matters within his jurisdiction, whether acquiesced in or appealed from and confirmed, absolute and conclusive.

PLATT, B.:

I am not prepared to bind myself by the decision which is said to have been come to by the Judges, that, under circumstances like the present, a party is a "horse-dealer" within the meaning of the statutes. I state this, in order that I may not be taken to have pledged myself to that opinion, should the case come before me in a proper shape as one of the Judges. But my difficulty is this, that, striking out of the avowry the allegation that the plaintiff was a "horse-dealer," enough remains to justify the act of the defendant. I cannot doubt but that the Legislature intended the assessment to be binding, unless appealed against. Indeed, it is of the first importance that the revenue should be quickly raised. Then, for the protection of the subject, the Legislature has given a right of appeal, first to the Commissioners, and afterwards, by a special case before the Judges; thus providing a cheap and expeditious remedy. Without saying, therefore, whether the facts of the case are sufficient to satisfy my mind that the plaintiff is a "horse-dealer" within the meaning of the Act, I think the defendant is entitled to the judgment of the COURT.

Judgment for the defendant.

1848. *June* 3.

[395]

CLARK *v.* WOODS, SMITH, AND COOPER.

(2 Ex. 395—409; S. C. 17 L. J. M. C. 189.)

The stat. 43 Eliz. c. 2, s. 4, which gives a remedy for the levying of money assessed for poor-rates, does not extend to costs; and the 18 Geo. III. c. 19, s. 1 (1), under which justices have power to award costs in such a case, limits the period for which the defaulter can be imprisoned to the term of one month.

A warrant issued by two justices of the county of S., after reciting the making of a rate, the assessment of the plaintiff in the sum of 17*l.* thereto, and his refusal to pay the same, and that R. H. and L. W., two justices &c., had issued their warrant to levy the said sum of 17*l.* 19*s.* 6*d.*, and the further sum of 6*s.* for costs incurred in the premises, making in the whole the sum of 18*l.* 5*s.* 6*d.*, by distress &c., commanded the constable to apprehend and take the plaintiff to the House of Correction, there to remain "until payment of the said sum:" Held, that the warrant was bad *in toto;*

(1) Repealed by S. L. R. Act, 1887; see now 12 & 13 Vict. c. 14, ss. 1 and 2.

and that an action of trespass lay against the justices and the constable for the arrest and imprisonment under it.

The backing of the warrant under 24 Geo. II. c. 55, s. 1 (1), by a justice is purely ministerial, and the justice who issues the warrant is responsible for an arrest under it, although it be backed and executed in a county other than that in which it was issued.

A demand of the copy and perusal of the warrant, signed by the plaintiff's attorney, was left by his clerk: Held, a sufficient demand under 24 Geo. II. c. 44, s. 6.

Where the plaintiff had obtained a copy of the warrant previously to a demand thereof: Held, that the constable was not thereby excused from complying with the demand.

The mere fact of the justices being joined in the action against the constable does not entitle the constable to a verdict under the 24 Geo. II. c. 44, s. 6, which section only protects him in case he has complied with the demand of a copy and perusal of the warrant.

A party having been arrested under the foregoing warrant, and having paid under protest the money specified in it: Held, that he was entitled to recover back the whole of the money so paid, although the 17*l.* 19*s.* 6*d.* was really due from him in respect of the rate.

TRESPASS for assault and false imprisonment. Plea, Not guilty "by statute."

It appeared at the trial, before Pollock, C. B., at the London sittings after Michaelmas Term, 1847, that, in consequence of the plaintiff, who resided at South Bersted, in the county of Sussex, refusing to pay his poor-rates and certain costs incurred for the same, the following warrant for his apprehension had been issued by Mr. Woods and Mr. Smith, two of the defendants, who were magistrates for *that county, and was delivered to Cooper, the other defendant, to be executed by him: [*396]

"Sussex, to wit.—To the constables of the parish of South Bersted, in the county of Sussex, and to the keeper of the House of Correction.—Whereas, in and by a rate and assessment made, assessed, allowed, and published according to the statute in that case made and provided, bearing date the 5th of July and 13th of December, 1845, and the 20th day of March, in the year 1846, Richard Clark, an inhabitant and occupier of lands and hereditaments in the said parish of South Bersted, was duly rated and assessed for and towards the necessary relief of the poor of the said parish, in the sum of 17*l.* 19*s.* 6*d.* in the whole; and whereas it duly appeared unto Richard Hosler and William Leyland Woods, Esqrs., two of her Majesty's justices of the peace in and

(1) Repealed by S. L. R. Act, 1867. As to backing warrants, see now 11 & 12 Vict. c. 43, s. 3, and c. 42, s. 11, and *sed quære* whether these Acts apply to proceedings for the recovery of poor rates (see *Reg.* v. *Price* (1880) 5 Q. B. D. 300, 49 L. J. M. C. 49).—J. G. P.

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for the said county, as well upon the oath of Cornelius Legg Sparks, assistant-overseer of the poor of the said parish, as otherwise, that the said sum hath been lawfully demanded by him, but the said Richard Clark hath refused and doth refuse to pay the same; and whereas the said Richard Clark, having been summoned duly to appear before two of her Majesty's justices of the peace of the said county, to show cause why the same should not be paid, did not appear according to such summons, and hath not shown any sufficient cause why the same should not be paid; and whereas, on the 25th day of April last, Richard Hosler and William Leyland Woods, two of her Majesty's justices of the peace in and for the said county, did issue their warrant to the churchwardens and overseers of the poor of the said parish of South Bersted, to levy the said sum of 17*l.* 19*s.* 6*d.*, and also the further sum of 6*s.* for costs incurred in the premises, making in the whole the sum of 18*l.* 5*s.* 6*d.*, by distress and sale of the goods and chattels of the said Richard Clark, and to apply the same according to law; and whereas it duly appears unto us, two of her Majesty's justices of the peace for the said county, as well upon oath of the said [*397] Cornelius *Legg Sparks as otherwise, that he has used his best endeavours to levy the said sum on the goods and chattels of the said Richard Clark as aforesaid, but that no sufficient distress can be had whereon to levy the same: these are therefore to command you, the said constables of the said parish of South Bersted aforesaid, to apprehend the body of the said Richard Clark, and him safely to convey to the House of Correction at Petworth, in the same county, and there to deliver him to the said keeper thereof, together with this precept; and we hereby command you, the said keeper of the said House of Correction, to receive into your custody, in the said House of Correction, the said Richard Clark, there to remain, without bail or mainprise, until payment of the said sum. —Given under our hands and seals, the 31st day of October, A.D. 1846.

"W. LEYLAND WOODS (L.S.)
"FRANCIS SMITH (L.S.)."

The plaintiff was followed by the defendant Cooper to London, where he presented the warrant to the Lord Mayor and got it backed; he then arrested the plaintiff and took him to a station-house. The plaintiff paid the sum of 18*l.* 5*s.* 6*d.* under protest. It appeared that a demand of the copy and perusal of the warrant, signed by the plaintiff's attorney, had been served by one of his

clerks at Cooper's residence. No copy or perusal of the warrant had ever been granted by Cooper; but whilst the plaintiff was in custody at the station-house, a copy of the original warrant was made by the clerk of the plaintiff's attorney, by the permission of the police, in whose hands the warrant then happened to be.

It was thereupon contended, on the part of the plaintiff, that, as the statute 43 Eliz. c. 2, s. 4, gives no power to levy or imprison for non-payment of costs, the warrant was bad, and offered no defence to the action; and that the plaintiff was entitled to recover back the sum of 18*l.* 5*s.* 6*d.*, *which had been paid by him under protest. On the part of the defendants, the following objections were raised to the maintenance of the action: First, that the warrant was good; that, by the stat. 18 Geo. III. c. 19, power is given to the justices to award costs in cases of non-payment of poor-rates; secondly, that, if the warrant was bad on the face of it, the justices were not liable for the execution of it out of their jurisdiction; and, thirdly, that the warrant was only bad so far as it related to costs, and that the amount of damages ought to be confined to that sum. On the part of the constable, Cooper, the following objections were also made: First, that he was justified under the stat. 24 Geo. II. c. 44, s. 6, as the magistrates had been sued jointly with him; secondly, that the service of the demand of a copy of the warrant, by the clerk of the plaintiff's attorney, by whom the demand was signed, was insufficient, as it ought to have been made by the person making the demand; and, lastly, that the copy of a warrant having been furnished by the police, this was a sufficient compliance with the statute, and dispensed with the necessity of a delivery of one by the constable. The LORD CHIEF BARON, however, overruled the several objections which had been relied upon by the defendants; and, under his direction, a verdict was entered for the sum of 18*l.* 5*s.* 6*d.*, reserving leave to the defendants to move to enter a verdict, or to reduce that sum to 6*s.*

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Rules *nisi* having been accordingly obtained on the part of the justices and of the constable,

Martin, *Willes*, and *C. E. Pollock* showed cause:

The questions in the present case depend mainly upon the following statutes, viz. 43 Eliz. c. 2, s. 4; 18 Geo. III. c. 19, s. 1; 24 Geo. II. c. 55, s. 1; 24 Geo. II. c. 44, s. 6. The warrant under

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which the plaintiff was arrested is clearly illegal; for the statute of 43 Eliz. c. 2, s. 4, does not empower the justices to award costs; and the statute 18 Geo. III. c. 19, s. 1, by which costs *may be awarded, directs the imprisonment to be "for any time not exceeding one month, nor less than ten days, or until such sum, &c. be first paid." This section, as it may be seen by the 3rd section and the forms annexed to the Act, limits the period of imprisonment to one month. In the present case the plaintiff would be liable to be imprisoned for life, if one item of the whole amount remained unpaid; for the warrant directs that he is to remain in custody, "without bail or mainprise, until payment of the said sum." The plaintiff was not to be released until the whole sum—namely, for rates and costs—should be paid. [They cited *Skingley* v. *Surridge* (1) and *Esdaile* v. *Maclean* (2).] The warrant is not divisible. The warrant is therefore clearly illegal and bad; but it is contended, that, even admitting it to be so, the justices are not liable for the arrest of the plaintiff, which, *although it was effected under a warrant issued by them, was executed out of their jurisdiction. By the 24 Geo. II. c. 55, s. 1, in case any person, against whom a warrant shall be issued by any justice of the peace of any county, &c., shall escape, &c., it shall be lawful for any justice of the county, &c., to which such person shall escape, &c., upon proof being made on oath of the hand-writing of the justice or justices granting such warrant, to indorse his name on such warrant, which shall be a sufficient authority to the person or persons bringing such warrant, &c., to execute such warrant in such other county. The justice, therefore, who indorses or backs the warrant, exercises no discretion in the matter —he performs a purely ministerial act. * * The justices, therefore, who issued this warrant are liable for the arrest. The warrant is void *in toto*, and there is no reason why the verdict should be reduced to the sum of 6*s*. * * *

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With respect to the objections which were raised on behalf of the defendant Cooper, the constable, as the warrant is illegal, he is not justified under it; for the 6th section of the 24 Geo. II. c. 44, does not afford him any protection. A proper demand of the copy and perusal of the warrant *was made, and was not complied with. * * The meaning of this section is, that the constable shall be entitled to a verdict, after such a demand and compliance as is required by the preceding part of the clause.

[*401]

(1) 11 M. & W. 503. (2) 15 M. & W. 277.

Crowder and *J. J. Johnson*, in support of the rule, on behalf of the justices: CLARK v. WOODS.

The warrant is good. It has been assumed that the words "the said sum" refer to the last-mentioned sum; but these words do not necessarily require such a construction. [402]

(POLLOCK, C. B., referred to *Esdaile* v. *Maclean* (1).)

The justices would have a difficulty to overcome in framing such a warrant as would meet the case in the manner which has been insisted upon by the plaintiff. Under the statute of Elizabeth, the party may be committed generally for non-payment of rates, and under the statute which gives costs, for a month only. How could such a warrant be framed?

(ALDERSON, B.: There might possibly be two warrants—one to detain the party for a month, or until he paid the costs, and the other to detain him until he paid the rates; or perhaps one warrant would be sufficient, provided it observed the proper distinction with respect to each sum.)

The recitals in the warrant, which refer to "the said sum, mean the sum due for rates: *Tarry* v. *Newman* (2). In the second place, assuming the warrant to be void, the justices are not liable. The arrest was out of their jurisdiction. The magistrate who backs the warrant has a discretion in the matter, and his act is ministerial only in case the warrant is good. Here it has been argued that the warrant is void upon the face of it; and the backing of such a warrant cannot make the justice who issued it responsible out of his jurisdiction. The statute which empowers the justice to back the warrant only entitles him to back a valid warrant. If this warrant is bad, it is merely an illegal order to arrest the plaintiff. The Lord Mayor could not have been compelled to back it by *mandamus*.

(They cited *Basten* v. *Carew* (3), *Carratt* v. *Morley* (4), and *Mould* v. *Williams* (5).)

(POLLOCK, *C. B.: The statute does not make any reference to the validity or invalidity of the warrant. Proof of the handwriting [*403]

(1) 15 M. & W. 277.
(2) 15 M. & W. 645.
(3) 27 R. R. 453 (3 B. & C. 649).
(4) 55 R. R. 183 (1 Q. B. 18).
(5) 64 R. R. 558 (5 Q. B. 469).

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of the justice by whom the warrant was issued is all that the statute requires.)

In the last place, the plaintiff is entitled only to the sum of 6*s.* by way of damages, as the warrant is good for the other sum due for rates, for which the plaintiff was liable to be arrested.

Bramwell, on behalf of Cooper, the constable:

The warrant is good, and the constable is not liable; and, even admitting the justices to be liable, the constable is not. They authorised him to act by the execution of the warrant in any county; for the warrant, by being backed, extends their jurisdiction. First, there was no proper demand made; for the 6th section of the 24 Geo. II. c. 44, requires the party who makes the demand to sign it. In the present case that was not so; for the attorney signed the demand which was made by his clerk. There are three parties who may make the demand. It has been argued that the words "made" and "left" mean the same thing, but that is not so. The party here who made the demand was the attorney's clerk, and therefore it should have been signed by him. Secondly, the demand, if sufficient, was complied with. *Atkins* v. *Kilby* (1) is in the constable's favour. What need had the plaintiff of a further copy of the warrant than the one which the attorney's clerk had obtained from the police? Thirdly, under the concluding clause of the 6th section of the last-mentioned Act, the constable is protected, although he may not have complied with the demand. The words of the Act are, "And if such action;" in order to support the construction for which the plaintiff contends, the word "and" ought to be "but." In the last place, with respect to the amount [*404] of damages. The original *arrest is the act complained of, and the plaintiff was released, therefore, before the money was paid; he can at all events recover nominal damages only in the present action.

POLLOCK, C. B.:

I am of opinion that these rules ought to be discharged. At the trial a verdict was taken by the plaintiff for 18*l.* 5*s.* 6*d.*, being merely the sum which had been paid by him under protest. The facts of the case are shortly as follows: The plaintiff owed certain poor-rates in the county of Sussex. An application was made to two magistrates to compel him to pay these rates; they thereupon

(1) 52 R. R. 503 (11 Ad. & El. 777).

granted a warrant to distrain upon his goods and effects to the amount of the rates, and the additional sum of 6*s.* for costs incurred in these proceedings. A warrant for his arrest, which recited this amount, was subsequently signed by the two defendants, and delivered to the defendant Cooper. Armed with the latter warrant, the defendant Cooper pursued the plaintiff into the city of London, where he presented the warrant to the Lord Mayor, who backed it. He then arrested the plaintiff, who thereupon paid the whole sum of money specified in the warrant, and obtained his liberty. The plaintiff having brought the present action against the three defendants, the question is, whether any or all of them are liable to the consequence of that arrest? That question depends chiefly upon the statutes to which our attention has been directed. In the first place, it is clear that the warrant was a bad warrant, and could have afforded no justification for the arrest of the party in the county of Sussex. The stat. 43 Eliz. c. 2, s. 4, which gives the power to levy the arrears of poor-rates by distress and sale of the defaulter's goods, and, in the event of such distress being insufficient, to commit him to the county gaol, does not mention costs; and the subsequent statute, the 18 Geo. III. c. 19, s. 1, which does give power to award costs, does not warrant the committal of the offender until such costs shall be paid, but only for a limited period, which is not to *exceed one month. The warrant was therefore illegal in the county [*405] in which it was issued, as there is no power given by either of these statutes to enforce the payment of the costs in the manner authorised by that document. It was then contended, on the part of the magistrates, that, admitting the warrant to be bad, they were not responsible, the arrest having been made out of the county of Sussex. It therefore becomes necessary to consider the effect of "backing" the warrant. The statute which gives that authority makes it purely a ministerial act. The warrant, therefore, when "backed," was the warrant of the magistrates, and not of the Lord Mayor. The act of "backing" has no reference to the legality or illegality of the warrant, and the magistrate who backs it is not subject to any risk which may arise from its execution. I am therefore of opinion, that the defendants Woods and Smith, who issued this warrant, are responsible for the arrest made under it.

On the part of the defendant Cooper, it was contended, in the first place, that the demand of the copy and perusal of the warrant, though signed by Steele, the plaintiff's attorney, was made by his clerk, and was, therefore, insufficient; but I think that the fallacy was

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well pointed out by one of the learned counsel in showing cause against the rule—that, although the clerk left the paper, yet the demand was in reality made by Steele, the plaintiff's attorney. The Act of Parliament intends that party whose name is signed to the document to be the party making the demand, although it be left by another person. The demand and service, therefore, in the present case, were in accordance with the terms of the statute, and were perfectly regular. In the second place, it was contended that, inasmuch as a copy of the warrant had been obtained on behalf of the plaintiff prior to the demand upon Cooper, he was excused from giving a copy. But it does not appear that the permission to give a copy was an act to which Cooper was in any way a *party, or such an act as could in any manner bind him. It appears that, on a subsequent occasion, a notice was served upon him, making a demand with which he did not comply; he was therefore not entitled to the protection of the statute. In the third place, it was urged, that, where the constable is sued jointly with the justices, upon proof of his having acted under their warrant, he is entitled to a verdict; and that the word "and" in the latter part of the section of the statute ought to have been "but," if the Legislature intended the other construction; but it appears to me that that branch of the clause clearly means that such is to be the case after a demand of the copy and perusal of the warrant has been complied with by the constable—the words "such action" referring to an action brought after "a demand and compliance therewith." I am therefore of opinion that none of the objections ought to prevail. In the last place, it was urged that the verdict ought to be reduced to the sum of 6*s*. only, and that we ought to give the defendants the benefit of the amount which was rightly due from the plaintiff. But I do not see how we can escape from the position, that, if a debtor is sued by his creditors for a debt justly due, and is wrongfully arrested and is compelled to pay it by duress of such imprisonment, such amount may be recovered back by action. The warrant, in our opinion, is wholly bad, and the plaintiff was wrongfully taken under it; he is therefore entitled to recover the whole sum which he was compelled to pay by means of the arrest under the warrant. I am therefore of opinion, that these rules ought to be discharged.

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ROLFE, B.:

I am of the same opinion. There were two rules moved for in

the present case—one on behalf of the magistrates, and the other on behalf of the constable; and I think that they ought both to be discharged. This is an action for false imprisonment. Two of the defendants are magistrates who signed and delivered a warrant *to [*407] the other defendant, Cooper, by whom it was executed. There is no doubt that the plaintiff was imprisoned by virtue of that warrant or document; and that, under that execution, he was detained until he had paid the sum alleged to be due for poor-rates and costs incurred. I am of opinion that the defendants were not justified under that instrument. I think it is clear that it is bad. The warrant authorised the arrest and committal of the defaulter to the House of Correction in the county of Sussex, until he should have paid the sum of 18*l.* 5*s.* 6*d.* If this be a larger sum than that for which the magistrates could compel payment in this manner, the warrant is altogether bad. Now, it appears that the plaintiff was not indebted in the full amount stated in the warrant for poor-rates, but that a portion of the sum was for costs. The statute of Elizabeth does not give costs. The statute of 18 Geo. III. c. 19, by which costs are given, contains special provisions for their enforcement, but gives power to commit only for the limited period of a month, and not generally until the whole amount shall have been paid. The warrant, therefore, was bad *in toto*. It was contended, in the second place, that, as it was capable only of being executed in the county of Sussex, and as it was executed out of that county, it was not executed within the jurisdiction of the magistrates, and, consequently, that they are not responsible. But I do not see anything in the warrant, if it be bad, which precludes it from being executed in any other county than that in which it is originally issued. One of the incidents attached to this warrant is, that, by being indorsed in the manner required by the statute, it may be made available in any county in England; and when a magistrate issues the warrant, it must be taken that he knows the law. The indorsement is, by the express provisions of the statute, merely a ministerial act, and does not in the least degree lessen the responsibility incurred by issuing the warrant in the first instance. I therefore do not think that *there is anything in that objection. [*408] With respect to the reduction of the damages, I should feel glad if I were able to assist the defendants in that part of the case; but, as the warrant was altogether bad, as the magistrates had no power to include the costs in it, as they have done, and as the plaintiff was under no obligation to pay the amount for which he was illegally

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arrested, he is entitled by law to recover back the whole sum so paid. With respect to the objections which were raised on behalf of the constable, I perfectly agree with the rest of the COURT in thinking that there is nothing at all in them. It appears that a proper demand was made by the plaintiff's attorney, which was delivered by his clerk. It is clear that the demand was a proper and sufficient demand, as required by the statute; and it is equally clear that the production of the warrant on the part of the police, and not by the constable, was not a sufficient compliance with the statute, to bring him within its protection. With regard to the last point, as to the objection raised upon the 24 Geo. II. c. 4, s. 6, I do not think there is anything in that. Under that section, I think it is plain that no action would lie against the constable separately, or against him jointly with the magistrates, after a proper demand and compliance therewith. But, in the present case, although there was a demand, there was no proper compliance with it as required by the statute. I am therefore of opinion, for these reasons, that these rules ought to be discharged.

PLATT, B.:

I agree with the rest of the COURT in thinking that these rules ought to be discharged. The first question raised was, whether this document was legal or not; and I agree with the rest of the COURT in thinking that it is illegal and bad. It was contended that the magistrates were not liable, because the warrant was indorsed by the Lord Mayor. But I am of opinion that he was bound to do so upon his being satisfied with the genuineness of the *signatures attached to that document. It became his duty to indorse it. That act was merely a ministerial act upon his part; the effect of which was to make the city of London part of the county of Sussex, for the purposes of the execution of the warrant; but it did not relieve the magistrates who issued it from any responsibility. As to the amount of the damages, I do not see any reason which satisfies me that they ought to be reduced. What portion of the imprisonment is to be attributed to the payment of the larger or smaller sum? The law is perfectly clear, that, where a person has a sum of money extracted from his pocket by unlawful means, he is entitled to recover the whole of such amount back again. Upon the other points of the case, I entirely concur in what has been said by the rest of the COURT (1).

[*409]

Rules discharged.

(1) Alderson, B., had left the Court during the course of the argument.

SAYER *v.* GLOSSOP (1).

1848.
June 6.

(2 Ex. 409—412; S. C. 17 L. J. Ex. 300; 12 Jur. 465.)

[409]

In support of a plea of coverture, an examined copy of a register of marriage between the defendant and one J. G. was given in evidence. A witness deposed, that he knew one J. G. and his handwriting; and that the handwriting of the J. G. in the register was that of the person whom he knew: Held, that the evidence was admissible without the production of the original register.

ASSUMPSIT by the plaintiff, as indorsee, against the defendant, the acceptor of a bill of exchange, dated the 11th of July, 1847, payable three months after date. Plea, that at the time of the acceptance the defendant was the wife of Joseph Glossop, who is still living. Verification. The replication traversed the plea, and upon the replication issue was taken. At the trial, before Parke, B., at the last Middlesex sittings, in support of the plea, an examined copy of the register of the marriage of the defendant and one *Joseph Glossop was produced. A witness who was called deposed [*410] that he knew one Joseph Glossop, and that he had seen him in the year 1838, when he went abroad, and had corresponded with him since, and knew his handwriting, and that he had received a letter from him on the 25th of April, 1848. The witness then stated that he had seen the signature of Joseph Glossop in the original marriage register, at Marylebone Church, and that it was the handwriting of the Joseph Glossop from whom he had received the letter, and who was then alive. It was then contended, on the part of the plaintiff, that the original register ought to be produced. The learned Judge, however, thought the evidence was admissible, and the defendant had a verdict.

M'Mahon now moved for a new trial, on the ground that the evidence was improperly admitted:

The original register ought to have been produced. The jury should have had that document before them, that they might form a judgment as to the character of the handwriting. It was upon the handwriting that the question rested, whether the defendant was married to the Joseph Glossop who was alive, as stated in the plea. The original, being the best evidence of the fact, ought, therefore, to have been produced.

(POLLOCK, C. B.: The party who has the custody of the document could not be compelled to produce it.)

(1) See *Lucas* v. *Williams* [1892] 2 Q. B. 113, 61 L. J. Q. B. 595.—J. G. P.

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In cases of bigamy it is usual to produce the original register.

(PARKE, B.: That is not the usual practice. In the numerous cases which have come before me, I do not recollect a single case in which the original register was produced.)

POLLOCK, C. B.:

We are all of opinion that this rule must be refused, on the ground, that, as the person who has the legal custody of the register is not by law compellable to produce it, the party who stands in need of the evidence which that document affords is not to suffer [*411] from its absence *at the trial. The only question is, how far the jury will rely on the evidence which is offered in its stead. Suppose this case: the question being, whether a particular individual were at a particular place on a certain day, and in order to prove this a witness is called, who says, "I know that man very well; he was one of the churchwardens of our parish; and on that particular day I saw stuck up a certain notice, in his handwriting." It is then said, "Why do you not produce it?" The answer would be, that it is pasted against the wall, and therefore cannot be produced. You must therefore take the witness's account of it, as it is the best that can be obtained. Now if in point of law you cannot compel a party who has the custody of a document to produce it, there is the same reason for admitting other evidence of its contents as if its production were physically impossible.

ROLFE, B.:

I am of the same opinion, and will carry my Lord's illustration a little further. Suppose we heard that placards containing treasonable words were posted up, and that a witness were to say that he saw a man chalk certain words up, and that these were in the handwriting of A. B., surely that would be good evidence against A. B., as the production of the writing itself would be impossible.

PLATT, B.:

I think the evidence was properly admitted, as the defendant was not legally empowered to enforce the production of the original document.

PARKE, B.:

I still entertain the same opinion I did at the trial. In consequence

of the great importance of preserving parochial registers in a state of security, the law allows their contents to be shown by proper copies. That being so, you may prove the marriage between the parties by an examined copy of the register. Now, to prove the identity of a person, you may show that, in consequence of a [*412] particular mark, "B," appearing upon the register, such person was present at the time the entry was made upon it. In the present case, a witness swore that he had seen the original register, and that one of the signatures to it was that of a James Glossop, whom he knew: that was evidence that this James Glossop was the person who then married the defendant. I agree, that if the defendant could have got the register, but had not done so, it would go to the admissibility of the evidence produced; for the opposite party is at a disadvantage with respect to his cross-examination on that part of the case. But it is doubtful whether this document could have been obtained, as in many cases the parties who have the custody of these instruments are unwilling to allow them to be removed, and their production cannot be enforced; and their non-production is really for the public benefit. As, therefore, the law requires the register-book to be kept in a certain place, and permits you to give evidence of its contents by an examined copy, I think you may prove the identity of the party by showing that this mark was made in the book, and that this mark is in his handwriting.

Rule refused.

MACHU *v.* THE LONDON AND SOUTH-WESTERN RAILWAY COMPANY (1).

1848. *June* 6, 8.

[415]

(2 Ex. 415—433; S. C. 17 L. J. Ex. 271; 12 Jur. 501.)

Where a common carrier enters into a sub-contract with other parties with respect to goods which he has undertaken to carry, the servants employed by the latter are "servants in the employ" of the carrier, within the true meaning of the 8th section of the Carriers Act, 11 Geo. IV. & 1 Will. IV. c. 68.

A delivery-ticket issued by the defendants, a Railway Company, in respect of goods they had undertaken to carry, contained the name of T. J., described therein as a porter. The ticket was signed by "C. and H., agents." The goods were stolen by T. J. whilst under the care of C. and H.,

(1) Approved in *Doolan* v. *Midland Ry. Co.* (1877) 2 App. Cas. 792, and *Stephens* v. *L. & S. W. Ry. Co.* (1886) 18 Q. B. Div. 121, 56 L. J. Q. B. 171. —J. G. P.

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with whom the defendants had entered into a sub-contract for the carriage of the goods. In an action against the defendants for the loss of the goods, *quære*, whether the ticket estopped the defendants from denying that T. J. was their servant: *Semble*, that it would not.

CASE. The declaration stated, that the defendants were common
[*416] carriers of goods and chattels for hire, and that *the plaintiff, on &c., at the Andover Road station of the London and South-Western Railway, caused to be delivered to the defendants, and that the defendants then accepted and received, a certain bale of silk, of the value of 150*l.*, to be safely and securely carried and conveyed by the defendants to London, and there safely and securely to be delivered to the plaintiff, for certain reasonable reward, &c. It then charged as a breach, that the defendants, not regarding their duty in that behalf, did not nor would safely or securely carry or convey the said bale of silk to London aforesaid, nor there safely or securely deliver the same to the plaintiff; but, on the contrary, that the defendants so carelessly and negligently behaved and conducted themselves in the premises, that, by and through the carelessness, negligence, and default of the defendants, &c., the said bale of silk, &c. was wholly lost to the plaintiff. The defendants pleaded the general issue, and a traverse of the delivery of the goods, *modo et formâ*; and, thirdly, "that the said bale of silk in the declaration mentioned, and therein alleged to have been received by the defendants as such common carriers as aforesaid, contained only goods, and chattels, and property of a certain description, to wit, the silk in the declaration mentioned, and exceeded in value the sum of 10*l.*; and that the said bale of silk was heretofore, to wit, on &c., delivered by the plaintiff to the defendants, as common carriers by land of goods for hire, to be carried from and to the places in the declaration mentioned, at a certain office or receiving-house of the defendants for the receipt of goods to be carried by them as such common carriers as aforesaid, to wit, the said Andover Road station of the defendants; and that, before and at the time when the said bale of silk was so delivered at the said office of the defendants as aforesaid, the defendants had caused to be affixed, and there was affixed, according to the form of the statute in such case made and provided, in legible characters, in a public and con-
[*417] spicuous *part of the said office, a notice, whereby the defendants notified that a certain increased rate of charge therein mentioned was required to be paid over and above the ordinary rate of carriage, as a compensation for the greater risk and care to be taken for the

safe conveyance of, amongst other things, silk exceeding the value of 10*l.*; and that, at the time of the delivery of the said bale of silk at the said office of the defendants as aforesaid, the value and nature thereof were not declared by the person sending or delivering the same, and that neither the increased charge nor any engagement to pay the same was accepted by the person receiving the said bale of silk at the office." Verification.

The plaintiff took issue upon the first and second pleas; and to the third he replied, "that, whilst the said bale of silk was in the charge and possession of the defendants as such common carriers as aforesaid, to wit, &c., the same was unlawfully and feloniously stolen, taken, and carried away by a certain then servant of the defendants, to wit, one Thomas Johnson, whereby the same was not safely and securely carried or conveyed, or delivered as aforesaid, but then was and now is wholly lost to the plaintiff by reason of the said felonious act of the said Thomas Johnson," &c. Verification. The defendants rejoined by way of traverse, "that, whilst the said bale of silk was in the charge and possession of the defendants as such common carriers &c., the same was unlawfully and feloniously stolen, &c. by a then servant of the defendants then in the employ of the defendants, *modo et formâ:*" upon which rejoinder the plaintiff joined issue.

At the trial of the cause, before Pollock, C. B., at the London sittings after Michaelmas Term, 1847, the following facts appeared: The action was brought by the plaintiff against the defendants to recover of them the value of a bale of silk. The plaintiff was a silk-trimming manufacturer, and carried on his business at Bunhill Row, London; *and the bale in question had been delivered to the [*418] defendants at their office at the Andover Road station, to be carried and by them delivered to the plaintiff at his above address. The value of the bale was not declared when it was delivered to the defendants, and the ordinary charge only for the carriage of a parcel of that bulk was paid. The bale was placed in a van under the care of a person named Thomas Johnson, on the arrival of the train at the Vauxhall station of the Company. The following delivery-ticket was sent with the bale in question:

"(114). London and South-Western Railway Company.

"Southampton, Gosport, Andover, &c., every morning before eight, and afternoon before six o'clock.

"From Hambro' Wharf, Lower Thames Street, &c."

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(Here follows a notice from the Company that they would not be liable for certain descriptions of articles, including silk, above the value of 10*l.*, unless the value thereof should be declared, and the increased charge paid, &c.)

"The delivery of goods will be considered complete when the same are unloaded out of the waggon, dray, or cart, and placed at the door of the consignee: the cellaring or warehousing them afterwards will be at the owner's risk.

"Any servant of the Company taking more than is stated in this ticket will be dismissed.

"*Notice.*—The Company are not responsible for any parcel above the value of 10*l.*, unless declared as such at the time of booking, and entered and paid for accordingly. It is requested that any irregularity may be notified immediately to

"CORNELIUS STOVIN,

"General Manager of Traffic.

[419] "Mr. Machu, Bunhill Row, to South-Western Railway Company.

"1846. June 16. One truss, paid on 2*s.*

"James Beedy,
"Charles Goodwin,
"William Lee,
"George Clay,
"*Thomas Johnson*,
"George Fry,
} Porters.

"Goods conveyed to or from any part of London, by addressing a line to Mr. Ritches, at the Delivery-office, as above.

"CHAPLIN AND HORNE, Agents."

The bale was stolen by Johnson on the road between the station and its destination. Johnson was in the employ of Chaplin and Horne, who were employed by the defendants to carry goods for them; but it did not appear under what precise contract they did so. It was thereupon contended by the defendants' counsel, that Johnson was not a servant of the defendants, and in their employ, within the true meaning of the 8th section of the Carriers Act, 11 Geo. IV. & 1 Will. IV. c. 68. The LORD CHIEF BARON, however, entertained a different opinion; and under his Lordship's direction, a verdict was entered for the plaintiff, with leave reserved to the defendants to move to enter a verdict for them on the third issue.

Martin having subsequently, in Hilary Term, obtained a rule *nisi*.

Sir F. Thesiger and *E. H. Woolrych* now showed cause:

There are two questions in the present case. The first is, whether the defendants are not estopped by the delivery-ticket. If that should be answered in the affirmative, the *plaintiff is entitled [*420] to succeed. If not, then comes the question, whether Johnson, who stole the silk which was intrusted to the defendants to be delivered in Bunhill Row, London, is a servant within the true meaning of the 8th section of the Carriers Act, 11 Geo. IV. & 1 Will. IV. c. 68. It is submitted that, at all events, he was a servant of the defendants within the meaning of the 8th section. The Railway Company may select whom they please to deliver the goods committed to them; and the mere fact that such person is also employed by others does not make him less the servant of the Company. He may be servant to both; but for the delivery of this silk upon this occasion Johnson was the Company's servant. (They were then stopped by the COURT, who called upon)

Martin and *Montague Smith* to support the rule:

With respect to the first question, it is clear that the delivery-ticket does not estop the Company. It is not signed by the Company, but by Chaplin and Horne, and does not form any part of the contract. The defendants are, therefore, not estopped from showing that the party who had to deliver the goods, but who stole them, was not their servant.

(POLLOCK, C. B.: In *Pickard* v. *Sears* (1), Lord DENMAN says that the rule of law is clear, "that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." The principle was the same in *Gregg* v. *Wells* (2), and *Coles* v. *The Bank of England* (3).)

The defendants are not estopped, for the reasons before given. It is contended also that Johnson was not a servant within the meaning of the 8th section. * * If it were to be held that the [421]

(1) 45 R. R. 538 (6 Ad. & El. 469).
(2) 50 R. R. 347 (10 Ad. & El. 90).
(3) 10 Ad. & El. 437.

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Company are liable for this felonious act of a person as their servant, that person being the servant of third parties, the consequence would be, that one Railway Company would be liable for the acts of the servants of any other Railway Company along whose line the goods are carried. Thus, if certain goods are delivered to [*422] Railway Company A., *to be delivered in some distant part of the country, and A. deliver them to Railway Company B., and B. to C., and so on, and the goods are stolen by Z.'s servants, A. would be liable for the loss of the property. As this Act was passed for the protection of carriers, the 8th section ought to have a strict construction put upon it; and a carrier ought not to be held responsible, unless the person who steals the article be his own servant—*i.e.* a person hired and paid by him, and under his control. The relationship of master and servant ought strictly to exist between the carrier and this party. The words of the 8th section support this construction, for there the parties named are all such servants as would be in the employ of the carrier; as, for instance, "coachman, guard, bookkeeper, porter." Now it is clear that Chaplin and Horne are not the servants of the Company; they had merely to deliver the goods under a sub-contract. If Chaplin and Horne are not the Company's servants, how can their servant be the Company's servant?

(PLATT, B.: The replication alleges that the goods were stolen "by a certain then servant of the defendants then in the employ of the defendants.")

Such an allegation can only be supported by such a relationship as that for which the defendants contend. [They cited *Laugher* v. *Pointer* (1), *Quarman* v. *Burnett* (2), *Rapson* v. *Cubitt* (3) and *Coats* v. *Chaplin* (4).]

[424] POLLOCK, C. B.:

I am of opinion that this rule ought to be discharged. The point which was contended for by *Sir Frederick Thesiger*, in the outset of this case, cannot prevail, namely, that the mere production of the document disposes of the question, and, by its contents, is to be taken as a holding out of the person Johnson, who stole the silk, as a servant of the Company. I do not think that is the question which we have now to dispose of. The real question is that which has

(1) 29 R. R. 319 (5 B. & C. 547).
(2) 55 R. R. 717 (6 M. & W. 499).
(3) 60 R. R. 873 (9 M. & W. 710).
(4) 61 R. R. 297 (3 Q. B. 483).

been discussed by *Mr. Martin*, and at by no means greater length than its importance warranted; and I do not think he has brought less of illustration and learning to bear upon it than the occasion called for. I *have paid great attention to the argument, and the whole matter comes to this: It appears that Chaplin and Horne had contracted with the Railway Company to do this part of the business for them; that they were not the servants to the Company, but were its agents; and that the persons whom Chaplin and Horne employed, whom they paid, and to whom they gave orders, and had power to dismiss—these persons were still further removed from the Company, as being servants to Chaplin and Horne, and not to the Company. Then it is said by *Mr. Martin*, that the Act of Parliament in question distinctly gives the Railway Company, as carriers, indemnity against responsibility from loss, unless certain conditions are complied with; that the 8th section re-imposes their common-law liability under certain circumstances only, and that, in order to bring the plaintiff within that section, he must show that the felonious act was committed by an actual servant of the Company. In proceeding to put a construction upon this statute, I have allowed the fullest scope to *Mr. Martin's* argument, and I thoroughly comprehend its force. I also perfectly agree that we have no right to make an Act of Parliament; that it is only our duty to construe those that are made; and that we ought to consider, not what the Legislature might have done, but what they have done: and with a perfect perception of the force of the argument derived from the expressions of Mr. Justice LITTLEDALE, in the case of *Laugher* v. *Pointer*, I am still of opinion that this rule ought to be discharged. And I think it ought to be discharged upon the general ground, which I prefer to any other, that there was an employment of Johnson by the Company, leaving out of consideration, for the present, all that relates to the holding him out as a servant of the Company. Taking it that the document in question proves that, on the Company receiving this parcel in the country, it was the undertaking on their part to deliver it in London, I am of opinion that Johnson was, within the meaning of the 8th section of the *Act, a servant in their employ. A state of things perhaps altogether different from what existed at the time of the passing of the statute, has sprung up, in consequence of railroads having come more extensively into use; but the general object of the Act was to give protection to carriers in respect of small parcels of great value placed under their care, without any

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notice of their value, thus compelling them to incur considerable risk with but little remuneration; and the Legislature has effected this by requiring the value of such parcels to be declared, and an additional sum to be paid to the carrier by way of insuring their safe delivery; and nothing can be more just than such an enactment. In order, however, to guard the public against the consequences of effecting such insurance—for one consideration for the insurance is the disclosure to the carrier's servants by such notice of the value of the goods to be transmitted—the Legislature, whilst it says that the carrier shall not be liable unless the article sent be insured, goes on to provide that, whether it be insured or not, the carrier shall still be liable "to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any coachman, guard, bookkeeper, porter, or other servant in his employ." And I am of opinion that this liability cannot be disposed of by the introduction of the term "agent," or by giving a principal name to the employment of any one employed to discharge the duty undertaken by the carrier. In the case which was put in the course of the argument, where a carrier confines himself to receiving goods and making contracts for their carriage, and avails himself of a sub-contract to transfer to some one else the whole duty which he has undertaken to perform, I think that all the parties who come in under that subsequent contract, whether directly or by the sub-contract—I think that all the parties actually employed in doing the work which the carrier undertook to do, either by himself or by his servants, are his servants within the meaning of *the 8th section of the Act in question. I therefore think that, within the meaning of this section, Chaplin and Horne were the servants of the Company; they were employed by the Company to take these goods from the railway station, and to deliver them in Bunhill Row; and that any persons whom Chaplin and Horne employ for the same purpose are also servants of the Company for that purpose, within the meaning of the Act. Although the Company could not dismiss the porters, inasmuch as the contract was made between those parties and Chaplin and Horne, and not with the Company, yet substantially they were servants in the employ of the Company, as doing what the Company had engaged to do. On the general question, therefore, which turns upon the proper construction of the Act of Parliament, seeing, as I do, that this Railway Company received these goods upon an undertaking to carry them, and to deliver them in Bunhill Row, I think that everything done

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with respect to the carriage of the goods is to be considered as done by the servants employed by the Company, and that the substitution of any other words, such as "agent," or "sub-contract," cannot have the effect of taking them out of the meaning of the Act. Those persons who do the act are their servants. It may be added, —for, although I do not lay much stress upon it in the grounds of my judgment, I think it right to say, if I entertained any doubt on the general question (which I do not), that where the document which has passed between the plaintiff and the defendants describes the person who is to do the work as their servant, the inference to be drawn from that document is, that that person was at the time a servant of the Company. When it also appears, that in that ticket the plaintiff is made debtor to the Company for the carriage of the goods, and the porter who stole them is described as one of the Company's porters, then I say that it is not competent for them to substitute another and a different name for his. I do not, however, attach much importance to this part of the *case; for, [*428] upon the general question, I am of opinion, that whoever discharges the duty which these Companies may have undertaken are to be considered, in point of law, to be their servants within the meaning of this statute. The plaintiff is, therefore, entitled to recover in this action, and this rule must be discharged.

ROLFE, B.:

I am of the same opinion. The first difficulty raised in the present case proceeded on the notion that the Company, by the delivery of a ticket in which Johnson's name as a porter appeared, were either estopped, or if not so, yet that that evidence was so conclusive on the point, that no other inference could be drawn from the facts of the case. I fairly own, that, if the matter rested on this ground alone, I should have entertained very great doubt whether the plaintiff would be entitled to succeed. I think that it is clear, that the document was mere matter of evidence, and that it would not have been an estoppel. With regard to the fact of service, I think that there was abundant evidence to show that Johnson was the servant, not of the Company, but of Chaplin and Horne. But, even if that be so, I do not think that it is material to discuss that point. I have turned the subject over in my mind much since the occasion when it was last argued, and therefore I do not decide the matter on the spur of the moment. The Company, it appears, received these goods at the Andover Road

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station, and undertook to deliver them at Bunhill Row in London, as common carriers; and I think that the statute must be construed, with respect to this Railway Company, as it would have been under the old system in former times. It seems that the practice of the Company was to bring the goods which were carried by them to the Vauxhall station; and, as was assumed, and we may therefore take it as proved, that they employed Chaplin and Horne to deliver these goods in different parts of London for them. Chaplin and [*429] Horne employ Johnson, *and he steals the goods. The question then arises, are the Company liable for that felonious act? They would undoubtedly be liable, unless the statute has limited their liability. The Act says, that carriers shall not be liable for goods of this description unless an insurance price be paid; but then comes the 8th section, which provides, "that nothing in this Act shall be deemed to protect any mail contractor, stage-coach proprietor, or other common carrier for hire, from liability to answer for loss or injury to any goods or articles whatsoever, arising from the felonious acts of any coachman, guard, bookkeeper, porter, or other servant in his or their employ." Is Johnson, then, a bookkeeper, porter, or other servant in the employ of the Company? I think he is. I admit that the question of liability, arising from the acts of servants or agents, has been a subject well considered of late years. I agree in what was said by Mr. Justice LITTLEDALE, in *Laugher* v. *Pointer*, and by this Court, in *Quarman* v. *Burnett*, which has been acted upon in *Rapson* v. *Cubitt*; but I do not think that those cases apply to the present. In those cases a wrongful act had been done by somebody, and the question was, has the party injured a remedy against some one other than the actual party who committed the injury? Against the actual party of course he has a remedy. The answer is, yes he has, against the master of the party who did the damage. The liability for the wrongful act originates from the relation of master and servant. That is not so here. The right against the Company arises, not from the relation of master and servant, but by virtue of a contract into which they have entered to deliver the goods. The Company defend themselves on the ground, that the person who stole the goods was not their servant. What, then, is the meaning of the word "servant," in the 8th section of the Act? It has been contended, on the part of the defendants, that no one is a servant of a carrier, within the meaning of that section, unless he be actually [*430] hired, *retained, and paid by him. I do not, however, see how

such a construction can possibly be put upon that section; for it says, that "nothing in the Act contained shall protect from liability from loss or injury arising from the felonious acts of any coachman, guard, bookkeeper, porter, or other servant in his employ." What is the meaning of that? The Legislature felt that, having given protection to the carrier against responsibility for goods not insured, it was not necessary to say that, in the event of uninsured goods being stolen by the carrier himself, he should not be entitled to protection; but they proceed at once to speak of the felonious acts of bookkeepers or other servants in his employ. I think that a very large construction ought to be given to these words; they must be taken to mean bookkeepers, porters, or other servants actually employed to do what the carrier has undertaken to do. The Legislature not only contemplated that a carrier might himself carry the goods delivered to him, but that he might hand them over to another person to carry. If they were stolen by himself, he of course would not be protected; neither do I think he would if the person whom he had employed as a substitute were to steal them. Unless that construction be adopted, this anomaly would follow. Nothing was more common, under the old system, than for the coachman to hire the guard, or the guard the coachman; and if a person had lost anything sent by a stage-coach, and had sued the proprietor, could the claimant be turned round by the proprietor saying, "I did not employ the guard or coachman?" I think, therefore, that when the Legislature used the word "servant" in this section, they meant to say, the carrier being clearly liable if he steals the goods himself, and it being his ordinary duty as carrier to carry them himself, he shall equally be responsible if any other person employed under the contract steals them. I therefore think that Chaplin and Horne were servants of the Company within the meaning of the 8th section of the Act of Parliament, *and that [*431] every person was so who was directly or indirectly employed by them to do what they had contracted to do by themselves or by others under them. I therefore am of opinion, that the plaintiff is entitled to succeed, and consequently that this rule ought to be discharged.

PLATT, B.:

I am of the same opinion. This statute, when considered with attention, can be very plainly expounded, and ought to be construed with reference to the duty of carriers, according to the custom of

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the realm. Without this statute a carrier would be liable for the safety of the goods until their arrival at their place of destination. Suppose, in this case, the goods, instead of having been stolen, had been injured by careless treatment between the railway station and the place of delivery, could there be any doubt that the carrier would, in case the goods were insured, be liable for the damage they might have received? I think there could not; and for this reason, that the carriers who drove the horses, in taking the goods from the station to their ultimate place of destination, were the agents and servants of the Company for that purpose. The form of the declaration would be, that the defendants were guilty of negligence by their servants. These porters are consequently, for some purposes, the agents of the Company; for they have entered into a contract in respect of these goods, which depends upon and refers to the contract in question. This case is totally different from that of the job-master, who drives the horses he lets out for hire by his postilion, and over the postilion the hirer of the horses has no control whatever. In every case the owner of horses or a vessel is bound to place them under such governance as shall prevent the occurrence of any injury by negligence to any of the subjects of the Queen. If any injury does occur, the master who placed the negligent person there becomes himself responsible for the injury

[*432] which has been so *done. But all these cases rest upon a totally different principle; for there the mischief is brought about by the person who drives or authorises the driver; and therefore, as regards the public, the job-master, and not the party who hires the horses, is the master of the driver. The present case arises out of a relation created by contract. A carrier undertakes to carry goods from one place to another, and then it is said, that, because the goods were stolen by a servant of a sub-contractor employed by the carrier, the carrier is not responsible. It is clear that this question is not affected by the decisions on cases of negligence, which are independent of any contract between the parties. We must therefore look to the meaning of the statute. Its meaning was this—as the great responsibility cast on carriers, without due notice of the value of goods committed to their care, operated as a great hardship upon them—for if the carrier knew that a parcel bailed to him was of great value (as, for instance, a casket of jewels) he would not leave it exposed to the hands of a thief—it was, therefore, thought just by the Legislature, that the carrier should have notice of the value of the article; and that, if he had not, he need not use extraordinary

care, and should not be responsible for it in case it should be lost. The means the Legislature took of effecting that was by requiring the bailor to pay a premium for the additional care to be employed in the carriage of the goods. But the Legislature say to the carrier, "Although we give you all this protection in that case, we will not extend it to those cases where the loss has been by felony." That is the meaning of the 8th section; for its effect is to take out of the operation of the statute all losses occasioned by felony on the part of persons who, in case of loss, might be treated as servants of the carrier; for I say that the persons so employed are his servants within the true meaning of this section, although it is unnecessary to go to that extent in coming to a decision in the present case. I have paid the *utmost attention to the vigorous [*433] and ingenious arguments of the learned counsel for the defendants; but I still think, that, upon the construction of the statute, the matter is very plain. Any person employed by a carrier to perform the contract into which he enters, is a servant in the employ of the carrier, within the true meaning of this statute. Any other construction would be the parent of very dangerous consequences. These Companies might let out every single part of their carriers' business, which is generally very extensive, to others, who might employ other servants under them. If we were to hold that such persons are not the servants of the Company, a complete immunity would be obtained from the responsibility for every single theft that might be committed from one end of their line to the other, under the pretext that the persons by whom the theft had been committed were not their servants or in their employ. It would be an exceedingly dangerous doctrine to hold, that these persons, who enjoy all the profits derived from the carriage of the goods, shall, by a sub-contract unknown to the other party, get rid of their responsibility. As to the other point, I think that the ticket produced did not operate as an estoppel, but that it was mere matter of evidence.

Rule discharged.

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1848. *June* 15, 16.

(2 Ex. 457—470; S. C. 6 Dowl. & L. 27; 17 L. J. Ex. 321; 12 Jur. 521.)

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The class of persons intended by the words, the persons "for the time being," in the 13th section of the stat. 7 Geo. IV. c. 46, are those persons who, at the time the execution issued, were members of the Banking Company. In proceeding, therefore, under that section, the proper course for

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a plaintiff, who has recovered judgment against the public officer of such Company, to pursue, is in the first instance to issue writs against those persons who are at that time members of the Company; but the plaintiff may proceed against the other classes which the statute renders liable, in case he can satisfy the Court, with a reasonable degree of certainty, that the execution previously issued would be ineffectual.

Those persons who become members of a joint-stock Company after the contract sued upon was complete, and have ceased to be so before the judgment was obtained against the public officer, are not subject to any liability under the Act.

It is no answer to a motion for leave to issue a *scire facias*, upon a judgment recovered against the public officer of a joint-stock Banking Company, against a person who was a member at the time that the contract was entered into in respect of which the judgment has been recovered, that such judgment was fraudulently concocted; such defence must be raised by plea, or form the subject-matter of an application to set aside the proceedings as fraudulent.

IN this case a rule had been obtained on behalf of the plaintiff, one of the public officers of the Whitehaven Bank, calling upon one John Brooke to show cause why an execution upon a *scire facias* (1) should not issue against him, on a judgment recovered by the plaintiff against the public officer of the Newcastle Joint-stock Banking Company, the said John Brooke having been a member of that Company at the time the contract was entered into, but having ceased to be so at the time the judgment was recovered.

Against this rule cause was shown (June 15) by *Watson*, *Cleasby*, and *Willes*.

The *Attorney-General* and *Martin* were heard in support of it.

Cur. adv. vult.

PARKE, B., now (June 16) delivered his judgment:

[*458] This case, which was argued before me yesterday, I cannot help regretting that I should be called upon to decide, as it *is one which involves a very important rule of practice, and also some important questions of law arising on the construction of the statute upon which the matter depends. However, it became impossible to dispose of the matter before the full Court, and I have now to pronounce my decision upon the question which comes before me, which I am happy to be able to do with the assistance of the Court upon the principal point, all of them concurring with me in opinion, that no rule of practice prevents me from entertaining this

(1) Proceedings by *scire facias* are not abolished, but the usual procedure now is that provided for by R. S. C. Ord. XLII. r. 23.

application. With regard to the other parts of the case, I shall pronounce my opinion according to the best judgment I can form upon it.

The principal point is, whether it is now competent for me to entertain this application. Upon this I have had the assistance of the other Judges of this Court, and I have also conferred with some of the Judges of the Court of Queen's Bench. This is an application under the stat. 7 Geo. IV. c. 46, s. 13, for permission to issue a *scire facias* against Mr. Brooke, who is alleged to have been a member of the Banking Company, here sued in the name of their public officer, at the time the contract sued upon was entered into by that Company with the plaintiff. Several objections were taken to the plaintiff's right to this rule, one of which was disposed of in the course of the argument; namely, that the judgment was a judgment which was fraudulently concocted to the prejudice of the proprietors in the joint-stock Bank. If there is anything in the objection, there is no doubt the defendant must avail himself of it, either in the form of a plea to this *scire facias*, or in the form of an application, specifically for the purpose of setting aside the proceedings as fraudulent; and I have now, therefore, to address my attention only to two other points which were moved before me. The first of these, then, is, is it competent for me to entertain this application at all, the objection being, that it has been already disposed of in such a way as, according to the established practice of this Court, to preclude any further inquiry? *Several cases were [*459] cited to show to what extent the Courts had gone in laying down the rule, that after an application to them has been made, and has failed on account of defective materials, they will not allow any further inquiry. There is no doubt that such is the established practice of the Court of Queen's Bench, as appears from the cases which have been cited; and I presume it to be the practice of the other Courts also. That practice appears not to have been first adopted, but sanctioned, by a rule of the Court of Queen's Bench, of Hilary Term, 3 Jac. I., by which it was made highly penal, if a matter had been disposed of in the presence of both parties, to agitate the same matter again, and that upon the principle, that where there had been a judgment upon the case, it was conducive to the due administration of justice that the matter should not again be agitated. Now there can be no doubt that the Courts have gone beyond that part of the rule which requires the matter to have been disposed of in the presence of the counsel of both parties,

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because they have held a party equally bound where the rule which he has obtained was discharged, although he himself, the counsel for the party obtaining the rule, was never heard. Many cases were cited as having been recently disposed of in the Court of Queen's Bench on the general principle I have stated: *Reg.* v. *Orde* (1), *Reg.* v. *Manchester and Leeds Railway Company* (2), *Reg.* v. *The Inhabitants of Barton* (3), *Reg.* v. *Pickles* (4), and *Reg.* v. *Great Western Railway Company* (5), in all of which the rule was recognised, that if there has been an application to the Court, and the matter has been disposed of by the COURT, the parties will not be allowed to re-agitate the same matter. An exception indeed exists in cases where the affidavits have been wrongly intituled, *or there has been a defect in the jurat. None of these cases go the length of saying, that under no circumstances can the party make an application to the Court on fresh materials, nor do I understand that the Court of Queen's Bench has so decided. To that question, however, it will not be necessary further to advert in the present case, because it does not appear upon these affidavits that any fresh materials have been obtained; and therefore the question will turn upon quite a different point, upon which I am to pronounce my judgment, and in which the rest of the COURT concur. Most of the cases which have been cited are, it is to be observed, cases in which the matter is determined finally by the decision of the Court. Every one of them, indeed, is of that description, except the case of *Rex* v. *Bowditch* (6), in which there was an application made for a criminal information, which was refused on the ground of there not being sufficient evidence of the defendant's handwriting; and the COURT, upon a subsequent application, would not allow the plaintiff to amend the case by producing affidavits to the handwriting of the defendant. That decision went simply upon the ground, that a criminal information was an extraordinary remedy, and that, a party having taken his chance once, there was no reason why he should have a remedy given him on a second application, the law being open to him to proceed by way of indictment.

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In the present case, the first question is, whether the same rule applies to a case in which the plaintiff, having obtained a rule, afterwards chooses to abandon it. A rule was obtained on the 29th

(1) 8 Ad. & El. 420, *n.*
(2) *Ib.* 419.
(3) 9 Dowl. P. C. 1021.
(4) 12 L. J. Q. B. 40.
(5) 64 R. R. 580 (5 Q. B. 597).
(6) 2 Chit. Rep. 278.

of May, 1847, for leave to issue a *scire facias* against Mr. Brooke upon such affidavits as were then prepared. The rule was enlarged, no cause was shown in the course of Trinity Term, and it was then further enlarged to show cause in Michaelmas Term. In *the [*461] meantime, on the 7th January, 1848, the plaintiff gave notice of his intention to abandon the rule, and pay the taxed costs of it, which offer was accepted, and those costs paid. Must, then, the matter be considered as having been finally disposed of by the Court? For if it has, and the plaintiff's application is to be understood as having been once refused, it will become necessary to consider the next question, namely, whether this case forms an exception to the general rule which prohibits the moving the same matter a second time. As to this latter point, I am by no means prepared to say that it does not; and in this the rest of the COURT concur with me, without, however, meaning to give a binding decision upon the point; for we feel a difficulty in applying the same strict rule to an application for a writ, which is required by statute, and which is given in lieu of an action. There is no doubt that, if the plaintiff had issued a *scire facias* against one or more members, or several writs of *scire facias* (supposing it to be competent for him to do so), in the first instance against those who were the parties "for the time being," if he had been nonsuited in one of those actions of *scire facias*, he would have been at liberty, and without leave of the Court, to proceed again by a second *scire facias*, and so on, *toties quoties*, until the proceeding had been determined by a verdict for the plaintiff or the defendant. And this being an application to the equitable jurisdiction of the Court, to have a remedy against a second class of persons, it would be difficult to say that the Court should be so bound up by any rule, as that they would not permit a second application to be made, or a second *scire facias* to issue, in case the first had failed; but I agree, that in such a case it would be proper that the party applying a second time to the Court for permission, should lay before it some ground why he had failed upon the first, and show some good reason why he should apply to the Court a second time, to make the defendant liable to a *scire facias*. I have before observed, that upon looking *through the [*462] affidavits there is no explanation why the first *scire facias* was abandoned; and no new facts are said to have been discovered by the plaintiff, to justify him in making a second application to the Court. There is no affidavit, that at the first time the application was made they had made what they thought a sufficient

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inquiry, but that since, on making further inquiry, they had discovered clear evidence of the insolvency of some of the parties, whereon to justify the application to the Court on new facts. The affidavits do not contain a word of that. All I know upon the affidavits is, that in the first instance the plaintiff obtained a rule, and afterwards, for some defect or other in the affidavits (what it was does not appear), he has again applied to the Court.

The question here then is, whether, simply because the plaintiff has obtained a rule and abandoned it, under the circumstances here stated, he is to be considered as bound in the same way in which he would be bound by a decision of the Court, on the case coming before it and being disposed of. This depends entirely upon what the effect is of the plaintiff withdrawing his application. On the 7th of January, 1848, this rule having been twice enlarged, the plaintiff gave the following notice to Mr. Brooke: "Take notice, that the plaintiff hereby abandons the rule *nisi*, made in this cause on the 29th of May last, whereby it is ordered, that John Brooke therein named show cause, on Friday the 4th of June next, why a writ of *scire facias* on the judgment obtained by the plaintiff in this cause should not issue against him, as a member of the Newcastle Joint-stock Banking Company; and the plaintiff in like manner abandons the rules subsequently made for enlarging the said rule of the 29th of May last; and the plaintiff hereby offers to pay any costs which may have been properly incurred in consequence of the said rule, to be taxed by the Master." To that proposal Mr. Brooke accedes, and the costs of these proceedings are taxed and paid accordingly; and the question really is, *what is the bargain between the parties. Is it a bargain that they should be placed in precisely the same situation as if the rule had been brought on and disposed of by the Court, or is it an offer merely to withdraw the writ, and that the plaintiff should stand in the same situation as if that writ had not issued at all? If the latter construction is to prevail, and the party is to be in the same situation as if the rule had been disposed of by the Court, then I think the plaintiff must fail in this application, for the reasons I have mentioned; namely, that he has not shown any satisfactory ground, upon his affidavit, why this case is different now from what it was on the 29th of May, 1847, at the time he first made the application. But if the meaning is this—"I will agree to withdraw what I have already obtained, and to stand in the same situation as if the rule is not issued, and will now at once offer to pay you the costs of

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that rule; but if you choose to go on, then the matter must be tried in Court, and you must take your chance of succeeding or not; but I make the offer to you to abandon my application altogether, if you will consent to receive the taxed costs of it;" then the plaintiff will be at liberty to renew the application. It is really a mere question of construction upon the agreement between the parties; and, having conferred with my brother Judges upon that subject, we are all of opinion that the real meaning of the contract is, that the former application was to be withdrawn, Mr. Brooke consenting to receive the costs absolutely; whereas, if the matter had gone on, in case of a refusal, the plaintiff would peradventure have succeeded; at least, he would have had his chance of succeeding.

The question then will be, whether, supposing that this was a new application to the Court, founded upon this affidavit, the plaintiff would be entitled to succeed, and whether permission ought to be given to him to issue a *scire facias* against Mr. Brooke; and the question which arises in the first instance is, whether he was a partner at the time of the *contract entered into. I do not [*464] trouble myself with that part of the affidavits which disputes that fact, because that is a matter which must be tried upon the plea to the *scire facias*; but I direct my attention to the other facts of the case, many of which, it is very properly argued, if not all, could not be questioned upon any issue to the writ of *scire facias*; and therefore I must take care, to the best of my ability, to be right in forming my judgment upon them. Now the objections which are made to the issuing of this *scire facias* are, first, that the plaintiff has not taken the proper steps in the first instance, by issuing a *scire facias* against the proper persons primarily liable; and secondly, that, supposing the plaintiff has done that, then upon these affidavits there is no sufficient case made out for the interference of the Court in granting this *scire facias* against the party to the contract, because other writs of *scire facias* have been sued out against other parties, and that it is yet undetermined that the result of them will be fruitless.

The first and important question in the case, which I very much regret that I should have for the first time to determine, although there are *dicta* upon the subject, and a prevalent opinion respecting it, is, what class of persons are meant to be designated by the statute under the description of persons "for the time being." It cannot be denied that this statute is very inartificially framed, and

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I have no doubt that the person who prepared the 13th clause had in his mind an idea which the recent decisions show was erroneous. There is no doubt but that the framer of that clause supposed, that as soon as a judgment was obtained against the nominal defendant, the public officer, it would be competent to the plaintiff to issue immediately execution against those persons who were partners in the concern, and that there need not previously be a suggestion upon the record, or a writ of *scire facias*, or any other proceeding. In that respect he was wrong, because it was decided in Ireland, [*465] that you could not make a *person liable who was not made a party to the record by some proceeding or other; and in the case of *Barton* v. *Hunter* (1), before Bushe, Ch. J., the course approved was, that there should be a suggestion on the record, that being thought to be the proper technical mode of introducing facts upon the record which did not appear upon the record before. In the case of *Bartlett* v. *Pentland* (2) the Court of Queen's Bench concurred in opinion with the Irish Court, that it was not competent for the plaintiff to issue a process of execution against a person who did not upon the record appear to be a party to the judgment, the COURT intimating that a suggestion was the proper mode of making him a party to the record. It was subsequently, however, considered, and very properly, that this was not the technical mode of proceeding, but that the proper mode was by issuing a *scire facias* against the persons who were partners at the time, to give them an opportunity of pleading to the *scire facias* that they were not partners, and if they were, then they would properly become liable to the judgment on the record: *Bosanquet* v. *Ransford* (3), *Cross* v. *Law* (4), *Whittenburg* v. *Law* (5), *Harwood* v. *Law* (6), *Clowes* v. *Brettell* (7). Now I think it cannot be denied that the class of persons who must have been liable to an execution in the first instance, if the notion of the framers of the Act had been carried into effect, is the same class that must now be proceeded against by *scire facias* in the first instance. It is impossible to see who would be partners at the time of issuing the actual execution; and no other date, therefore, can be assigned as the time of their being partners, than the issuing of the *scire facias*. That is the beginning of the execution. I think that is a matter which does not admit of

(1) 8 Hud. & Br. Ir. Rep. 569.
(2) 1 B. & Ad. 704.
(3) 12 Ad. & El. 813.
(4) 6 M. & W. 217.
(5) 6 Bing. N. C. 345.
(6) 7 M. & W. 203.
(7) 10 M. & W. 506.

the least doubt; and the question is, what is the class of persons who are to be liable according to the terms of this *clause? Now it is a good rule to go by in the interpretation of a statute, to act upon its grammatical construction, unless it leads to some incongruity or manifest absurdity. The words of the clause are, "execution upon any judgment obtained against any public officer, for the time being, of any such corporation or copartnership carrying on the business of banking, under the provisions of this Act, whether as plaintiff or defendant, may be issued against any member or members, for the time being, of such corporation or copartnership." What is the grammatical construction of the words "for the time being?" Surely they mean for the time being of the act with respect to which it is spoken; this must, therefore, be an execution against the persons who, at the time of the execution, were members of the Banking Company. That is, undoubtedly, the grammatical meaning of the terms "for the time being," to whatever subject they apply, or to whatever act they apply. The Legislature is considered as speaking of persons who fill a particular character at the time of the act about to be done, unless it can be shown by the context that there was clearly a different meaning to be put on the words. *Mr. Cleasby*, in a very able argument, suggested that the context showed this, and that there would be a great hardship in making persons liable upon contracts, who were not liable at the time of the contract made; and that the proper meaning of the terms "for the time being" must be persons who were members of the Company at the time of the commencement of the original action; that, as I have said before, is surely not the grammatical construction of the words; and besides, it would let in an absurdity as great, or nearly so, as any which would follow from using the terms in their ordinary grammatical sense; because it makes persons liable at the commencement of the action, who were not liable at the time of the contract made. It is quite impossible, looking at this Act of Parliament, to say that the Legislature meant to restrict the creditor to the common law liability of the debtors; for the statute really made three other classes of persons liable, *besides those who are liable by the common law. It makes, in the first place, those liable who were parties at the time of the execution; and then, in failure of these, those who were members of such copartnership at the time the contract or agreement on which such judgment was obtained was entered into. This is the common law liability; but the statute does not confine the remedy

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to persons who were partners at that time, for it goes on to extend it to those who become members "at any time before such contract was executed;" so that, in the case of executory contracts, those are liable who are partners at the time of the execution of the contract, and they were not liable at common law. And in the next place, it makes those liable who were members "at the time of the judgment obtained:" and these also are not liable at common law. It is therefore perfectly clear, that this statute means to impose some additional liability beyond that which the common law imposed on the members of these copartnerships. I think there is no doubt that the object of the Legislature was to accomplish a thing which it is very difficult to accomplish; namely, to treat these bodies as corporations, as to the mode of suing them; and further not to confine the remedy of the creditor to the partnership property, but to make each individual partner personally responsible for the debts of the partnership. The object of the Legislature in allowing execution to be taken out against persons who were not liable as contracting parties, and also against those in the second degree, who were partners at the time of the contract executed or judgment obtained, and not at the time of the contract made, was upon the supposition that these persons had all the means of applying the funds of the society, and ought to have applied them, to the payment of the partnership debts; and probably they considered, that persons who were actual members at the time the execution issued, and when the debt, therefore, ought to be paid, are the persons who, in the first instance, ought to be looked to, to take care that the partnership funds were applied to the payment
[*468] of the debt; *and that, if they do not choose to apply them, or have not the means of applying them, they should be responsible in their own persons for its due payment. That seems to be the principle upon which the Legislature acted: a principle of some harshness towards those who were not members when the contract was made; but then there is no doubt, as the *Attorney-General* has observed, that this Act was framed upon the supposition that these Companies would be always solvent, and would have funds with which to meet their debts. If that be the correct view, the effect is, to make those who are partners at the time the execution issues, liable; and then, in the event of an execution against them being unsuccessful, the remedy is to be taken against those who were partners at the time of the contract; against those who were so at the time of the contract being completed; and against those who

were so at the time of the judgment being obtained. It is to be observed, that the Legislature has let slip one class of persons, whether intentionally or not I do not know, namely, those who have become partners after the contract was completed, and have ceased to be so before judgment obtained, although they were partners at the time the action was commenced. That case the Legislature did not provide for, and these persons are certainly exempt, for there are no words to embrace them. My opinion therefore is, that in this instance the plaintiff, by taking his remedy, by issuing writs of *scire facias* against the existing members of the Company (I mean those existing at the time the *scire facias* was obtained), has pursued the proper course, and that he was not bound to take out any *scire facias*, and would have been wrong to have taken out any *scire facias*, against those who were partners at the time that the action was commenced.

I come, therefore, to the last question, whether or not the plaintiff has entitled himself to this interference of the Court, by the steps which he has taken against those different persons who were members for the time being. Now, the affidavits state, that there are a great number *of persons who were partners in this concern, [*469] against whom it would be undoubtedly hopeless to take any proceedings. Seven writs of *scire facias* have been issued, which promise a result of about 130*l.* altogether. But then it is said that there are two persons against whom no effectual steps have been taken in order to make them responsible, and against whom proceedings might be taken with effect. Against one a *scire facias* issued; and it is objected, that the present proceeding ought not to be allowed until that writ has come to its determination, and been finally disposed of. Now, if I am satisfied that that writ would produce no result whatever, or no result worth the expense of proceeding in it, then the pendency of such *scire facias* is no answer to this application; and I take it that is the principle of the case (1) which was referred to as lately decided in the Court of Common Pleas, in which WILDE, Ch. J., seems to have thought at first, that you must issue a *scire facias* against every individual member for the time being, before you can apply to the Court for its interference against a person who was a member at the time of the contract made. That opinion was overruled by the rest of the COURT, who thought it was enough if they were satisfied that every reasonable and proper effort had been made for the purpose of obtaining

(1) 16 L. J. C. P. 203.

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payment of the debt due to the creditors, by recourse to those who were primarily liable. That is the rule upon which I think I must act in the present case; and, referring to the affidavits in the first place, with regard to the persons against whom the *scire facias* is pending, it appears to me that, looking to the affidavits on both sides, there appears to be no reasonable ground of expectation that anything will be obtained from the *scire facias*. The defendant there, it appears, was the promoter, and was a trustee for a Scotch insurance office, and he accepted the shares as such trustee. I think it is impossible to make the partners in the Scotch insurance
[*470] office liable through his *instrumentality directly; but then it is said, that if he were to pay the amount, he would have his remedy in equity against the cestuis que trust; and supposing that was not so, still, if he were sued, and the *scire facias* were pursued to execution, the probability is, that the members of the Scotch Company would not leave him to pay the debt, but would come forward upon a principle of honour, and discharge him. I think that is rather too remote a contingency for me to say that any good result can reasonably be expected to be produced from that *scire facias*, unless the defendant is himself a person in solvent circumstances. Now the affidavits on the part of the plaintiff show, that he is not a man likely to pay any reasonable portion, or indeed anything, of the considerable debt which is in dispute in this action, while the affidavits on the other side, although they say that he is apparently carrying on business, do not remove that impression from my mind. The same also may be said with regard to the other individual, who is stated to be a person possessed of considerable property. The affidavits on the other side say that the property is greatly incumbered by mortgage beyond its real value, and that therefore any proceeding against him must be hopeless. I therefore think, that in this case the plaintiff has done what the majority in the Court of Common Pleas, and ultimately, I believe, my Lord Chief Justice WILDE, said was necessary in such a case. A similar rule, I think, was previously laid down in the Court of Queen's Bench, (see *Eardley* v. *Law* (1) and *Harvey* v. *Scott* (2)). The rule is, that all that is requisite in this case is, that a *scire facias* should issue against an existing member or members, and that there should be a reasonable certainty that all remedies against that class would be ineffectual. I am satisfied of this, and therefore the rule must go.

Rule absolute.

(1) 12 Ad. & El. 802.

(2) 17 L. J. Q. B. 9.

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1848.
June 13.

(2 Ex. 487—503; S. C. 18 L. J. Ex. 68; 12 Jur. 800.)

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Where a person, apparently of sound mind and not known to be otherwise, enters into a contract which is fair and *bonâ fide*, and which is executed and completed, and the property, the subject-matter of the contract, cannot be restored so as to put the parties *in statu quo*, such contract cannot afterwards be set aside either by the alleged lunatic or those who represent him.

Therefore, where a lunatic purchased certain annuities for his life of a society which, at the time, had no knowledge of his unsoundness of mind, the transaction being in the ordinary course of the affairs of human life, and fair and *bonâ fide* on the part of the society: Held, that, after the death of the lunatic, his personal representatives could not recover back the premiums paid for the annuities.

The grantee of an annuity cannot take advantage of the want of inrolment of a memorial, as required by the 53 Geo. III. c. 141 (2).

ASSUMPSIT by the plaintiff, as administratrix of Thomas Lee, against the defendant, as secretary of the National Loan Fund Life Assurance Company, for money had and received to the use of Thomas Lee, and of the plaintiff as his administratrix, and on an account stated.

Plea, *Non assumpsit.*

At the trial of the cause, before Pollock, C. B., at the London sittings after Michaelmas Term, 1846, the jury found certain facts, and the plaintiffs had a verdict, leave being reserved to enter a nonsuit.

Gurney, in Hilary Term, 1847, obtained a rule *nisi*, in pursuance of leave reserved, with leave to turn the facts into a special verdict. A special verdict was agreed upon, which embodied the following facts:

The present action was brought to recover from the defendant, the secretary of the National Loan Fund Life Assurance Society, two sums of 350*l.*, and 5*l.* 6*s.* 2*d.*, which had been paid by Thomas Lee, the deceased, to the society, under the following circumstances.

Thomas Lee, on the 29th of August, 1843, made a proposal to the said society for the purchase of an annuity of 21*l.* 12*s.* 10*d.* for his life, payable yearly on the 29th of August, the first payment to be made on the 29th of August in the following year, and that he should pay the sum of 350*l.*, as the consideration of that annuity; and on the same day he made a proposal to the said society for the

(1) Affirmed in the Exchequer Chamber, 4 Ex. 17, 18 L. J. Ex. 356; and see *Matthews* v. *Baxter* (1873) L. R. 8 Ex. 132, 134, 42 L. J. Ex. 73; *Imperial Loan Co.* v. *Stone* [1892] 1 Q. B. 599, 602, 61 L. J. Q. B. 449, C. A.—J. G. P.

(2) Repealed by 17 & 18 Vict. c. 90, s. 1.—J. G. P.

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purchase of a deferred annuity of 30*l.* for his life, to commence on his attaining the age of sixty years, which would be on the 30th of
[*488] June, 1864, the first payment to be on the *30th of June, 1865, reserving to him the option of receiving, in lieu of such annuity, the sum of 293*l.* 5*s.*, payable immediately, or the deferred sum of 377*l.* 5*s.*, to be paid to his representatives after his death. The proposals were assented to and accepted by the society, and the terms of the agreements were embodied in two policies of insurance, bearing date respectively the 29th of August, 1843. The sums agreed upon of 350*l.* and 5*l.* 6*s.* 2*d.*, were then paid by the deceased, who subsequently died intestate in 1844. No memorial of these annuities had ever been inrolled in the High Court of Chancery. At the time of the making of these proposals, and of the assenting thereto and acceptance thereof, and of the granting of the said annuities, and of the payment of the said sums by Thomas Lee, the intestate, he was a lunatic, and of unsound mind, so as to be incompetent to manage his affairs; but of this the society had not at that time any knowledge. The purchases of the annuities by Thomas Lee were transactions in the ordinary course of the affairs of human life, and the granting of the annuities to him in the manner and upon the terms before mentioned, were fair transactions, and transactions of good faith on the part of the society, and in the ordinary course of their business; and at the time of making the proposals, and at the time they were assented to and accepted by the society, and of the granting of the annuities, and of the payment of the two sums by him, he appeared to the society to be of sound, though he was then in fact of such unsound mind as aforesaid. The society first had notice of the unsoundness of mind of the grantee by letter dated the 23rd of September, 1843, from his solicitors. No commission of lunacy had ever been issued against the grantee. The society had never made any payments in respect of the annuities in question, but had always been ready and willing to pay any sum which might have become due under them, and had never attempted to avoid the agreements.

[*489] The plaintiff's points were, that the said Thomas Lee, *being of unsound mind, could not make a valid contract of the nature set forth in the verdict; and secondly, that the supposed contracts were void by statute, for want of inrolment. And therefore that the plaintiffs were entitled to recover back the sums of money so paid.

The case was argued in Hilary Term, on the 17th and 21st of January, by

Needham, for the plaintiffs:

The present case raises two questions for the opinion of this Court. First, whether the personal representatives of a lunatic can recover money which he has paid under a contract with a person who has entered into it *bonâ fide*, and without knowledge of the lunacy. Secondly, whether the annuity granted is void for want of inrolment. Upon the first point there is no direct authority; but there are many authorities in support of the principle that a lunatic cannot make a contract to bind his property. Thus, the old writ of *Dum fuit non compos mentis* lay to recover back land which had been aliened by a person not in his right mind (1); and it has been held, that a person *non compos mentis* cannot either make or revoke a will (2), and the Courts have always held their wills to be void. Nor can a lunatic suffer a recovery, *Hume* v. *Burton* (3), *Keene* v. *Keene* (4); nor execute a deed, *Yates* v. *Boen* (5); nor a bond, *Faulder* v. *Silk* (6); so he cannot indorse a bill of exchange, *Alcock* v. *Alcock* (7); nor state an account, *Tarbuck* v. *Bispham* (8). The rule is the same as respects parol contracts. In *Palmer* v. *Parkhurst* (9), a bargain by a lunatic, eight years before the lunacy found, was avoided by the party being found a lunatic.

(PARKE, B.: Was it suggested in that case, that it was known by the defendant, at the time *of the bargain, that the party was a lunatic?) [*490]

It does not appear by the report whether or not he was acquainted with the lunacy.

(PARKE, B.: We are not able to tell what the form of the plea was in *Alcock* v. *Alcock*; it does not appear whether there was any allegation of notice or knowledge of the lunacy.)

The principle for which the plaintiff now contends is, that a lunatic cannot enter into a binding contract, as he cannot have a consenting mind.

(PLATT, B.: In *Dane* v. *Viscountess Kirkwall* (10), it was held by PATTESON, J., at Nisi Prius, that it was not sufficient to show that

(1) Fitz. Nat. Brev. 202, (C).
(2) 6 Co. Rep. 23.
(3) 1 Ridg. Parl. Cas. 16.
(4) *Ib.* 91.
(5) 2 Stra. 1104.
(6) 13 R. R. 771 (3 Camp. 126).
(7) 3 Man. & G. 268.
(8) 46 R. R. 486 (2 M. & W. 2).
(9) 1 Ch. Ca. 112.
(10) 8 Car. & P. 685.

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Lady Kirkwall was of unsound mind, but that the jury must be satisfied that the plaintiff knew it, and took advantage of it. That ruling was subsequently upheld by the Court of Queen's Bench, in the same case.)

In *Clerk* v. *Clerk* (1), it was held, that a family settlement made by a lunatic ought to be set aside, although it was reasonable and for the convenience of the family. So the marriage of a lunatic is void: *Turner* v. *Meyers* (2). There Sir W. SCOTT says: "It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own past incapacity; and also that a defect of incapacity invalidates the contract of marriage as well as any other contract." In *Howard* v. *Lord Digby* (3), BROUGHAM, L. C., says, "The law on this point is as clear, both in equity and in lunacy, and at common law, as that a man's eldest legitimate son is his heir to freehold land. A lunatic cannot bind himself by bond or by bill; a lunatic cannot release a debt by specialty; cannot be a cognizor in a statute-merchant, staple, a judgment, warrant of attorney, or any other security."

(POLLOCK, C. B.: Surely a payment by a lunatic would be a good answer to the debt for which the lunatic was liable before his lunacy.)

The defence of intoxication stands upon the same principle as that
[*491] of lunacy; *and in the recent case of *Gore* v. *Gibson* (4), this Court held, that acts done by a man who had lost his senses at the time, are totally void.

(PARKE, B.: The ancient doctrine, that no man of full age shall be permitted to stultify himself, has been much qualified and restricted in modern times. There is a learned note on this subject, at the end of the report of *Gore* v. *Gibson*, in the Jurist, vol. 9, p. 142.

ALDERSON, B.: There is this distinction between the case of lunacy and that of intoxication: in the latter the incapacity of the party is patent—in the former, it may not be in the least degree visible.)

In one respect the two cases are analogous: in neither of them has the sufferer a consenting mind. A lunatic is not criminally liable: *Reg.* v. *Oxford* (5).

(1) 2 Vern. 212.
(2) 1 Hagg. C. R. 414.
(3) 37 R. R. 276 (2 Cl. & Fin. 661).
(4) 67 R. R. 762 (13 M. & W. 623).
(5) 9 Car. & P. 525.

(PARKE, B.: It has been held that a lunatic innkeeper is liable for the loss of his guest's goods: *Cross* v. *Andrews* (1).)

There are three exceptions to be found to the rule contended for in the case of lunacy; but these exceptions will, perhaps, be found to strengthen the rule. A fine levied by a person *non compos mentis* has been held good: *Thompson* v. *Leach* (2), *Needler* v. *The Bishop of Winchester* (3); and the reason, as it appears from *Beverley's* case (4), is, that the act is of a public and notorious character, done in a court of record, and that the Court had the power of judging of the sanity of the party. This is confirmed by stat. 18 Edw. I. s. 4, the "*Modus levandi fines*," and 10 Edw. II., "*De finibus*;" and by *Mansfield's* case (5), where a fine had been made by one Bushley, an idiot, "but notwithstanding this, and although the monstrous deformity and idiocy of Bushley was apparent and visible, yet the fine stood good." The second exception to the general rule is that of a feoffment by a lunatic: *Thompson* v. *Leach* (6). The COURT *there said, "There is a difference between a feoffment and a livery [*492] made *propriis manibus* of an idiot, and the bare execution of a deed by sealing and delivery thereof, as in cases of surrenders, grants, releases, &c., which have their strength only by executing them, and in which the formality of livery and seisin is not so much regarded in law, and therefore the feoffment is not merely void, but voidable; but surrenders, grants, &c., by an idiot, are void *ab initio*." The third exception is that of necessaries; but these are clearly excepted from the general rule, on the ground that they do not require a consenting mind. Thus, an infant or an idiot may be liable for necessaries, as was said in *Manby* v. *Scott* (7). The contracts, however, of an infant are only voidable, and not void. *Baxter* v. *Lord Portsmouth* (8) is a leading case upon this branch of the subject. ABBOTT, Ch. J., there says: "At the time the orders were given and executed, Lord Portsmouth was living with his family, and there was no reason to suppose that the plaintiffs knew of his insanity. I thought the case very distinguishable from an attempt to enforce a contract not executed, or one made under circumstances which might have induced a reasonable person to suppose the defendant of unsound mind. The latter would be cases of imposition; and I desired that my judgment might not be taken to be, that such

(1) Cro. Eliz. 622.
(2) 3 Mod. 305.
(3) Hob. 220.
(4) 4 Co. Rep. 124.
(5) 12 Co. Rep. 124.
(6) Carth. 435.
(7) 1 Sid. 112.
(8) 5 B. & C. 170.

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contracts would bind, although I was not prepared to say that they would not." In *Gore* v. *Gibson* (1), the distinction is clearly pointed out, namely, that, to make a party liable for necessaries, it is not necessary that there should be the assent of both parties. POLLOCK, C. B., there says: "With regard, however, to contracts which it is sought to avoid on the ground of intoxication, there is a distinction between express and implied contracts. Where the right of action [*493] *is grounded upon a specific distinct contract, requiring the assent of both parties, and one of them is incapable of assenting, in such a case there can be no binding contract; but in many cases the law does not require an actual agreement between the parties, but implies a contract, from the circumstances; in fact, the law itself makes the contract for the parties. Thus, in actions for money had and received to the plaintiff's use, or money paid by him to the defendant's use, the action may lie against the defendant, even though he may have protested against such a contract. So, a tradesman who supplies a drunken man with necessaries may recover the price of them, if the party keeps them when he becomes sober, although a count for goods bargained and sold would fail. In this case, the defendant is still liable for the consideration for his indorsement, although the indorsement itself can give the plaintiff no title."

(PARKE, B.: A fourth exception is mentioned in *Beverley's* case, viz. a recognisance.

ALDERSON, B.: Suppose the lunatic is benefited, do you argue that in such case the contract is void?)

It is submitted that it would be. (He also referred to *Neill* v. *Morley* (2), and Kent's Commentary, 451.) In *Turner* v. *Meyers* (3), Sir W. SCOTT says, "It is, I conceive, perfectly clear in law, that a party may come forward to maintain his own past incapacity, and also, that a defect of incapacity invalidates the contract of marriage, as well as any other contract. It is true, that there are some obscure *dicta* in the earlier commentators on the law (4), that a marriage of an insane person could not be invalidated on that account—founded, I presume, on some notion that prevailed in the dark ages, of the mysterious nature of the contract of marriage, in which its spiritual nature almost entirely obliterated its civil

(1) 67 R. R. 762 (13 M. & W. 623).
(2) 9 Ves. 478.
(3) 1 Hagg. C. R. 414.
(4) Sanchez. lib. 1, disp. 8, num. 15.

character. In more modern *times, it has been considered in its proper light, as a civil contract as well as a religious vow, and, like all civil contracts, will be invalidated by want of consent of capable persons." [*494]

(POLLOCK, C. B.: I recollect a case where a marriage was set aside, although there was no appearance of lunacy at the time of the offer of marriage.)

Pothier, in his Treatise on Obligations (1), says, "A contract is a particular kind of agreement; to understand the nature of a contract, we should, therefore, previously understand the nature of an agreement. An agreement is the consent of two or more persons to form some engagement, or to rescind or modify an engagement already made, *Duorum vel plurium in idem placitum consensus.*" Again, in speaking of persons capable or incapable of contracting, he says (2), "The essence of a contract consisting in consent, it follows that a person must be capable of giving his consent, and consequently, must have the use of his reason, in order to be able to contract." In the Appendix to that article, the distinction is pointed out between persons incapable by law of contracting, and those incapable by nature.

Secondly, the annuity is void, for want of the inrolment of a memorial, in pursuance of the statute 53 Geo. III. c. 141.

(PARKE, B.: If the grantor of an annuity chooses to go on paying it, it does not lie in the mouth of the grantee to say that the annuity is void. If any point was ever settled, I should say that was.)

The 17 Geo. III. c. 26, s. 1, declares, that all deeds, whereby annuities are granted, shall be null and void to all intents and purposes, unless a memorial be registered in manner prescribed by that Act. An opinion has long prevailed, that the statute was intended for the benefit of grantors only, and therefore the word "void" must be construed "voidable;" that doctrine, however, is at variance with the object of the Legislature. In *Crosley* v. *Arkwright* (3), where a person, against *whom a *fi. fa.* issued, was in possession of goods under a deed given in consideration of an [*495]

(1) P. 1, c. 1, s. 1, art. 1.
(2) *Id.*, art. 4.
(3) 2 T. R. 603.

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antecedent debt and an annuity, of which no memorial had been enrolled, it was held that the sheriff might return *nulla bona*, for the annuity deed was absolutely void. BULLER, J., there says, "The words of this statute are as strong as possible; it makes the deed void to all intents and purposes whatsoever." *Saunders* v. *Hardinge* (1) also decided, that every deed by which an annuity is secured, and which is not properly registered, is void, not voidable only. In *Denn* v. *Dolman* (2), which is to the same effect, Lord KENYON adverts to the distinction between the language of the 17 Geo. III. c. 26, s. 1, and that of the Registration Act, 7 Anne, c. 20, s. 1, which declares that a conveyance not registered "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration." Some expressions of TINDAL, Ch. J., in the case of *Cowper* v. *Godmond* (3), have given rise to a contrary doctrine. That case proceeded on the authority of *Weddel* v. *Lynam* (4), *Waters* v. *Mansell* (5), and *Davis* v. *Bryan* (6); the former of which alone is in point, but, at the same time, is a Nisi Prius decision which never received the consideration of the Court in banc. The true mode of construing statutes is to adhere to the ordinary meaning of the words, unless that is at variance with the intention of the Legislature: *Becke* v. *Smith* (7), *Biffin* v. *Yorke* (8).

Per CURIAM:

We feel no doubt about the last point. Both reason and authority show that it is not competent for the grantee of an annuity, who has omitted to inrol a memorial, to profit by his own default, and set up the want of registration against the grantor. The law was settled [*496] by *the cases of *Davis* v. *Bryan* (6), *Churchill* v. *Bertrand* (9), and *Cooper* v. *Godmond* (3).

Gurney, for the defendant:

It is conceded that an unexecuted contract by a lunatic cannot be enforced; but there is no case in which an executed contract, made for valuable consideration, and without notice of fraud, has been held void. In *Palmer* v. *Parkhurst* (10), the bill charged that

(1) 5 T. R. 9.
(2) 5 T. R. 641.
(3) 9 Bing. 748.
(4) 1 Esp. 309.
(5) 3 Taunt. 56.
(6) 30 R. R. 491 (6 B. & C. 651).
(7) 46 R. R. 567 (2 M. & W. 191).
(8) 63 R. R. 337 (5 M. & G. 428).
(9) 2 G. & D. 548.
(10) 1 Ch. Cas. 112.

the pretended satisfaction was not valuable, and was done in prejudice of the lunatic; the answer did not state it to be valuable. In *Clerk* v. *Clerk* (1) the conveyance was voluntary and without consideration. In *Addison* v. *Dawson* (2) fraud was alleged and proved. *Howard* v. *Digby* (3) shows that the law will sometimes imply a contract, notwithstanding lunacy. The earlier cases do not proceed on the ground, now exploded, that a lunatic cannot stultify himself, but that such contracts are not fair and equal between the parties. On that principle, an exchange, if equal, was held good. Perkins, in his Profitable Book (4), says, "And if a man of unsound memory, being seised of land in fee, exchanges the same with a stranger for other land in fee, and the exchange is executed, and he of unsound memory dies, and his heir enters into the land taken in exchange by his father, now he shall not avoid this exchange." So with respect to partition, in Co. Litt. 166 a, it is said, "If coparceners make partition at full age, and unmarried, and of *sane memorie*, of lands in fee simple, it is good and firm for ever, albeit the values be unequal; but if it be of lands entailed, or if any of the parceners be of *non sane memorie*, it shall bind the parties themselves, but not their issue, unless it be equal." Also in Bac. Abr. tit. "Idiots and Lunatics," (F), it is said, "The feoffment of an idiot or *non compos* is not *void, but voidable; but it [*497] cannot be avoided by himself, by entry, &c.; and the reason hereof, given in some books, is, as before observed, because no man by law is permitted to disable himself. The better reason in this case seems to be, that, anciently, these feoffments were not only made for the benefit of the parties, but of the realm, being annually paid for by the attendance of the tenants, in military service or in tillage, and so were presumed to be equally for the benefit of the lord and tenant; and therefore, they were not holden to be void in themselves." A lunatic may grant by fine; for, that proceeding having formerly taken place before a Judge, he was presumed to guard against any unfair advantage being taken of the lunatic: *Murley* v. *Sherren* (5).

(PARKE, B.: Was it not rather that the Judge was supposed to take care that the party was in a fit state of mind?)

The form of pleas in avoidance of contracts, on the ground of

(1) 2 Vern. 413.
(2) *Id.* 678.
(3) 2 Cl. & Fin. 634.
(4) Tit. "Exchange," pl. 298.
(5) 47 R. R. 720 (8 Ad. & El. 754).

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lunacy or drunkenness, shows that the inquiry in those cases is as to the transaction being fair; for such pleas invariably contain an averment of notice: *Dane* v. *Viscountess Kirkwall* (1), *Gore* v. *Gibson* (2). In *Sentance* v. *Poole* (3), where the defence of imbecility of mind was set up in an action by indorsee against maker of a promissory note, Lord TENTERDEN told the jury, that, "should they be satisfied that the defendant was not conscious of what he was doing, and that he was imposed upon by reason of his imbecility of mind, they ought to find for him." That learned Judge evidently considered, that the mere fact of being imbecile was not sufficient to avoid the contract, without showing that an unfair advantage had been taken. There is no distinction in principle between a contract by a lunatic for necessaries or for any other purpose, except that necessaries are evidence to show the fairness of the contract. It is true that *Baxter* v. *The Earl of Portsmouth* (4) was [*498] a case *of necessaries; but the judgment of Lord TENTERDEN proceeds on the ground, that the only contracts open to dispute are those not executed, or made under circumstances which might have induced a reasonable person to suppose the party was of unsound mind. *Williams* v. *Wentworth* (5) shows that, in the case of necessaries supplied to a lunatic, the law will imply a promise to pay. In *Browne* v. *Joddrell* (6), the defendant was charged on a contract, as a member of an institution, and Lord TENTERDEN ruled that unsoundness of mind was no defence, unless it were shown that the plaintiff imposed on the defendant. Reference is there made to a case of *Levy* v. *Baker*, in which the ruling of BEST, J., is to the same effect. *Dane* v. *Viscountess Kirkwall* (1), and *Clarke* v. *Metcalf* (7), are also cases in which lunatics we held liable on contracts, though not for necessaries. No case has yet decided, that an executed contract, if fair and *bonâ fide*, can be questioned on the ground of the lunacy of one of the parties. It is said that a lunatic is not criminally responsible; but the more correct statement would be, that a person being a lunatic cannot be guilty of that which amounts to murder or high treason.

(PARKE, B.: In *Beverley's* case (8), Lord Coke says, that a lunatic may commit high treason if he kills or offers to kill the King.)

(1) 8 Car. & P. 679.
(2) 13 M. & W. 623.
(3) 3 Car. & P. 1.
(4) 5 B. & C. 170.
(5) 5 Beav. 325.
(6) 3 Car. & P. 30.
(7) Cited in Smith on Contracts, 230.
(8) 4 Co. Rep. 123 a.

A lunatic is liable civilly for a trespass: he is also liable as an innkeeper, for the loss of his guest's goods: *Cross* v. *Andrews* (1). Whether or no he can state an account, seems undecided: *Tarbuck* v. *Bispham* (2). In *Selby* v. *Jackson* (3), the COURT refused to set aside deeds executed by a lunatic while under restraint in an asylum. The MASTER OF THE ROLLS, in delivering judgment, says: "In this case it is very remarkable, that there is no allegation of fraud against the defendants, no pretence that coercion was used, *or any stratagem, or any contrivance, employed to compel or [*499] induce the plaintiff to do an act in any way tending to the personal benefit of the defendants." This case falls within the rule laid down in *Niell* v. *Morley* (4), viz. that a court of equity will not interfere to set aside the contract of a lunatic, if fair and without notice, especially where the parties cannot be reinstated. The question is not, whether the payment of the premiums could have been enforced against the lunatic in his lifetime, but whether the purchase-money can now be recovered back. In many respects the case of a lunatic is assimilated to that of an infant; and the observations of Lord MANSFIELD, in *Zouch* v. *Parsons* (5), are applicable to both, viz., that "the privilege is a shield, and not a sword." This is like the attempt to recover premiums paid on an insurance without interest; in which case it has been held, that the premiums cannot be recovered after the risk has been run: *Lowry* v. *Bourdieu* (6). So also with respect to premiums paid on a policy void under the 19 Geo. III. c. 37: *Andree* v. *Fletcher* (7); or any illegal assurance: *Lubbock* v. *Potts* (8); *Morck* v. *Abel* (9).

Needham, in reply:

The case of *Baxter* v. *The Earl of Portsmouth* did not establish the rule, but the exception. The maxim of the Roman law, "*furiosus nullum negotium gerere potest, quia non intelligit quod agit*" (10), has been adopted by all text writers in every civilised community. Upon what principle is it that a lunatic cannot suffer a recovery, and that his bond is void, unless it be that he cannot make a contract? In *Thompson* v. *Leach* (11), the COURT say, "The grants of infants and persons *non compos* are parallel, both in

(1) Cro. Eliz. 622.
(2) 46 R. R. 486 (2 M. & W. 2).
(3) 6 Beav. 192.
(4) 9 Ves. Jr. 478.
(5) 1 W. Bl. 575.
(6) 2 Doug. 468.
(7) 1 R. R. 701 (3 T. R. 266).
(8) 7 East, 449.
(9) 3 Bos. & P. 35.
(10) Inst., lib. 3, tit. 20, s. 8.
(11) 3 Mod. 310.

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law and reason." A lunatic, not having the power of consenting, is incapable of making a contract.

Cur. adv. vult.

[500] The judgment of the COURT was now delivered by

POLLOCK, C. B.:

This was an action for money had and received, brought to recover from the defendant, (as secretary to an Assurance and Annuity Society), two sums paid by the intestate Thomas Lee, in his lifetime, as the price or consideration for two annuities granted by the society, determinable with his life. At the trial, the money was claimed on two grounds: first, that the grantee was not of sound mind at the time the contract was made, and was therefore incapable of contracting, and, there being no contract, or a void contract, the money was recoverable; secondly, that there was no memorial of the annuities inrolled, and therefore they were void, and the money could be recovered back. Both the points were reserved at the trial; and subsequently, on a motion for a new trial, a special verdict was entered by agreement, setting forth the facts of the case, and raising the two points above stated.

The special verdict was argued before us on the 17th and 21st of January last, when the COURT expressed a very clear opinion, that the second ground, of want of inrolment of a memorial, could not be supported, on the authority of the case of *Davis* v. *Bryan* (1), (and of other cases), where the point was expressly decided: but as to the other ground, the COURT took time to consider; and upon deliberation we are all of opinion, that, upon the finding of the jury, that the "purchasing the said annuities were transactions in the ordinary course of the affairs of human life, and that the granting of the said annuities were fair transactions, and of good faith, on the part of the Company, without any knowledge or notice on the part of the Company of the unsoundness of mind," the action is not sustainable; and our judgment must be for the defendant.

As to the rule of the common law, the older authorities differ. According to the opinion of Littleton, s. 405, and Lord Coke, 1 Inst.
[*501] 247 b., and *Beverley's* case (2), (disagreeing *with Fitzherbert's "Natura Brevium," 202), no man could be allowed to stultify himself, and avoid his acts, on the ground of his being *non compos mentis;* but certainly the law did not allow the party himself to

(1) 30 R. R. 491 (6 B. & C. 651). (2) 4 Co. Rep. 123 a.

set aside, by any plea of insanity, acts of a public and notorious character, such as acts done in a court of record, and feoffments with livery of seisin, the doing or executing of which would not presumably be allowed, unless a party appeared to be of sound mind.

The purchase also by a lunatic was valid, and vested the estate, and though his heirs might disagree to it, he could not (1).

But the rule, as above laid down by Littleton and Coke, has, no doubt, in modern times been relaxed, and unsoundness of mind (as also intoxication) would now be a good defence to an action upon a contract, if it could be shown that the defendant was not of capacity to contract, and the plaintiff knew it. The cases of *Dane* v. *Viscountess Kirkwall* (2), and *Gore* v. *Gibson* (3), were cited to prove this, and their authority fully supports the doctrine contended for. The plaintiff's counsel distinguished the cases of *Browne* v. *Joddrell* (4), and *Baxter* v. *The Earl of Portsmouth* (5), and other cases of that sort, on the ground that necessaries furnished to a lunatic were an exception to the general doctrine that he could not make a contract; and he cited the judgment of the LORD CHIEF BARON, in the case of *Gore* v. *Gibson*, as showing a distinction between express and implied contracts, and deciding that all express contracts were void, if the parties to them were incapable of making a contract. On the other hand, it was argued by the defendant's counsel, that there was a distinction between contracts executed and executory; that executory contracts could not be enforced, but that executed contracts could not be disturbed, *if made in good faith and without notice of the incapacity; and he called our attention to this, that all the cases cited were cases where damages for the breach of an executory contract were in question, but that no case had yet decided, that an executed contract, if perfectly fair and *bonâ fide*, could be questioned on the ground of the unsoundness of mind of one of the parties; and he cited the cases of *Howard* v. *The Earl of Digby* (6), *Williams* v. *Wentworth* (7), and *Selby* v. *Jackson* (8), to show that the House of Lords in the first case, and Lord LANGDALE in the two last, had recognised the liability of lunatics or their estate, in respect of contracts *bonâ fide* acted upon. The case of *Niell* v. *Morley* (9), before Sir William Grant, to the same effect, had been cited before by the counsel for the plaintiff.

[*502]

(1) Co. Litt. 2.
(2) 8 Car. & P. 679.
(3) 67 R. R. 762 (13 M. & W. 623).
(4) Moo. & Mal. 105.
(5) 2 Car. & P. 178; 5 B. & C. 170.
(6) 37 R. R. 276 (2 Cl. & Fin. 634).
(7) 5 Beav. 325.
(8) 6 Beav. 192.
(9) 9 Ves. 478.

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As far as we are aware, this is the first case in which it has been broadly contended, that the executed contracts of a lunatic must be dealt with as absolutely void, however entered into, and although perfectly fair, *bonâ fide*, reasonable, and without notice on the part of those who have dealt with the lunatic.

On looking into the cases at law, we find that, in *Browne* v. *Joddrell*, Lord TENTERDEN says, "I think the defence (of unsoundness of mind) will not avail, unless it be shown that the plaintiff imposed on the defendant."

In *Baxter* v. *The Earl of Portsmouth* (1), (the Nisi Prius authority of which is in 2 Car. & P. 178), ABBOTT, Ch. J., with the concurrence of the rest of the COURT, laid down the same doctrine.

In *Dane* v. *Viscountess Kirkwall*, Mr. Justice PATTESON, in directing the jury, said, "It is not sufficient that Lady Kirkwall was of unsound mind, but you must be satisfied that the plaintiff knew it, and took advantage of it."

[*503] We are not disposed to lay down so general a proposition, as that all executed contracts *bonâ fide* entered into must *be taken as valid, though one of the parties be of unsound mind; we think, however, that we may safely conclude, that when a person, apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property which is fair and *bonâ fide*, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties *in statu quo*, such contract cannot afterwards be set aside, either by the alleged lunatic, or those who represent him. And this is the present case, for it is the purchase of an annuity which has ceased.

On these grounds we think our judgment ought to be for the defendant.

Judgment for the defendant (2).

1848. *Jan.* 19, 31.

GAWLER *v.* CHAPLIN AND TWO OTHERS.

(2 Ex. 503—507; S. C. 18 L. J. Ex. 42.)

[503]

In an action on the case against the sheriff, the declaration, after reciting that two writs of *fi. fa.* had been delivered to him to be executed, stated, that the defendant, as such sheriff, under colour of the writs, wrongfully and injuriously seized goods of the plaintiff, of much greater value than

(1) 5 B. & C. 170.

(2) Affirmed on error by the Court of Exchequer Chamber, May 29th, 1849 (4 Ex. 17).

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sufficient to pay and satisfy the sum of money, interest, poundage, &c., indorsed on the writs, although the defendants well knew that the money arising from a part of the goods so seized would be sufficient to satisfy the indorsement on the writs; yet the defendant, contriving &c., afterwards, under colour of the said writs, wrongfully &c. did sell and dispose of more goods than necessary to satisfy the indorsement on the writs; and the defendant, further disregarding his duty &c., then sold the said goods for a much less sum of money than he could, might, and ought to have sold the same: Held sufficient, on motion in arrest of judgment.

CASE. The declaration stated, that two several writs of *fieri facias* had issued out of the Court of Queen's Bench, directed to the Sheriff of Middlesex, upon two several judgments recovered by one James Lees against the now plaintiff, which said writs were indorsed &c., and were afterwards, and before the respective returns thereof, to wit, on &c., delivered to the defendants W. J. Chaplin and J. L., who then, and from thence until and at and *after the return of the [*504] said writs, were Sheriff of the said county of Middlesex; and the defendant M. S., as their bailiff, afterwards and before the return of either of the said writs, to wit, on &c., within the bailiwick of the said W. J. Chaplin and J. L., as such sheriff as aforesaid, under colour of the writs, wrongfully and injuriously seized and took in execution divers goods and chattels, that is to say, (specifying them), of the now plaintiff, of much greater value than sufficient to pay and satisfy the sums of money, interest, poundage, and expenses, so indorsed on the said several writs, and thereby directed to be levied as aforesaid, to wit, of the value of &c., although the now defendants then well knew, that the money arising from the sale of part of the said goods and chattels so seized and taken in execution as aforesaid, would be sufficient to satisfy and pay the said sum of money, interest, poundage, and expenses, so indorsed and directed to be levied as aforesaid; yet the now defendants, contriving and wrongfully and unjustly intending to injure, oppress, &c., the now plaintiff, afterwards, to wit, &c., under colour and pretence of the said several writs, wrongfully and injuriously did sell and dispose of many more of such goods and chattels than were necessary and sufficient to pay and satisfy the said sums of money and interest, poundage and expenses, so indorsed and directed to be levied as aforesaid, to wit, the whole of the said goods and chattels so seized as aforesaid, and thereout levied a much greater sum than was sufficient to pay and satisfy all said sums of money, interest, poundage, and expenses, to wit, &c.; whereas the defendants then levied the said sum of money, interest, poundage, and expenses out and by means of the sale of part of the said goods and chattels, to wit, one-fifth part

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thereof: and the defendants, further disregarding their duty in that behalf, and contriving to injure the plaintiff, wrongfully and injuriously then sold the said goods and chattels for a much less [*505] sum of money, to wit, for &c., being much less, to wit, *&c., less than the same were really worth, and for which the defendants could and might have and ought to have sold the same: and the defendants then converted and disposed of the monies arising from the said sale to their, the defendants', own use; by means whereof &c. The defendants pleaded Not guilty, with other pleas, upon which issue was joined.

At the trial of the cause, before Rolfe, B., at the Middlesex sittings, in Hilary Term last, the plaintiff obtained a verdict. In the same Term, (Jan. 19),

Humfrey moved for a rule calling on the plaintiff to show cause why the judgment should not be arrested, or for a *venire de novo*; or why there should not be a new trial, on the ground of the verdict being against the evidence:

There are three breaches in the present declaration, and, if the Court should be of opinion that either of them is insufficient, the defendants will be entitled to a *venire de novo*. The first breach is bad. It charges the defendants with seizing goods of the plaintiff of greater value than sufficient to satisfy the sums indorsed upon the writ of execution. But the sheriff is justified in seizing enough to satisfy all demands for rent and taxes. The breach does not contain any allegation that the seizure was excessive or unreasonable. The second breach is also bad on the same grounds. It should have alleged that the defendants sold more goods than sufficient to meet the rent. Then the third breach does not state that the goods were sold negligently or improperly.

(ROLFE, B.: That breach alleges that the goods were sold for much less than the defendants could, might, and ought, to have sold them for.)

He referred to *Phillips* v. *Bacon* (1).

(PARKE, B.: The same question, with respect to the second and third breaches, arose in a case nearly similar to the present, *Slade* [*506] v. **Hawley* (2); that was upon special demurrer. The defendants may take a rule on the first ground, of the verdict being against

(1) 9 East, 298. (2) 13 M. & W. 757.

the evidence, but we will consider the question as to arresting the judgment.)

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PARKE, B., on a subsequent day, (Jan. 31), said:

A rule was granted in this case, to show cause why there should not be a new trial, on the ground of the verdict being against evidence. There was also a motion in arrest of judgment. It was an action brought by the plaintiff (who had been the defendant in another suit), against the Sheriff of Middlesex, for a wrongful execution. It was contended that there were three breaches, the first alleged breach being, that the defendants wrongfully seized goods of the plaintiff, of greater value than sufficient to pay the debt, interest, poundage, and expenses, although they well knew part would be sufficient. The second, which certainly was a breach, was for wrongfully selling more than sufficient; and the third was for selling goods for less than they were really worth, and than they ought to have been sold for. The principal objection was to the first alleged breach. With regard to the second and third there is no doubt: both are perfectly good after verdict, although they might be open to special demurrer. A special demurrer prevailed in a case nearly similar—that of *Slade* v. *Hawley* (1). The objection is therefore confined to the first breach, which alleges that the sheriff seized more goods—a larger quantity of goods than were sufficient, knowing that part only was sufficient to satisfy the debt, interest, poundage, and expenses. The question is, whether that breach is good. We are all of opinion it is a good breach. The duty of the sheriff, when he receives a process of execution against a man's goods, is to seize only such quantity of goods as would be reasonably sufficient to pay the amount *indorsed on the writ. [*507] *Mr. Humfrey* contended, that he ought also to provide for any rent that might be due to the landlord. The consequence of that doctrine would be, that, upon an execution for 10*l.*, if the premises were liable to a rent of 100*l.* a year, the sheriff might seize the whole property on the premises, because that might only be sufficient to cover the amount of the debt, together with the rent which might be possibly due. But we think the duty to seize in respect of a year's rent does not arise in the first instance, until the landlord has made a claim: if the plaintiff refuses to pay the amount of the rent, the sheriff may levy that amount under the original writ, and

(1) 13 M. & W. 757.

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consequently seize a larger quantity of goods. But, in the first instance, the duty of the sheriff is confined to seizing goods that would be reasonably sufficient, if sold, to pay the sum indorsed on the writ—that is, the debt, interest upon the debt, poundage, and expenses; and if the sheriff seizes more, *primâ facie* he is a wrong-doer. We think, therefore, that the first alleged breach, as well as the second and third, is good, and consequently we cannot grant any rule to arrest the judgment. The rule for a new trial, on the ground of the verdict being against evidence, must remain.

Rule refused.

The rule on the other point was now discharged, the parties having come to an arrangement.

1848.
June 16.

MURRAY *v.* MANN.

(2 Ex. 538—542; S. C. 17 L. J. Ex. 256.)

[538]

The plaintiff sold for the defendant a horse, and received the price. The purchaser afterwards rescinded the contract on the ground of fraud, and was re-paid the purchase-money. In an action by the plaintiff for the keep of the horse: Held, that the defendant could not set off the price as money received for his use, it having ceased to be so when the contract was defeated by the purchaser, although the defendant was ignorant of the fraud.

Any false statement knowingly made with a view to induce another to alter his condition, and thereby altering it, is a fraud in law.

THIS was an action by a livery-stable keeper for the keep of a horse, to which the defendant pleaded a set-off for money received by the plaintiff for his use.

At the trial, before Parke, B., at the London sittings in this Term, it appeared that the defendant had sent the horse to the livery stables of the plaintiff, where it stood for some time. The plaintiff at length sold the horse to a person of the name of Lilly for 125*l.*, with a warranty that it was sound and free from vice.

[*539]

Lilly kept the horse for about *three weeks, and then returned it as vicious, and received back from the plaintiff the 125*l.* The defendant sought to set off that amount, on the ground that it was received for his use by the plaintiff. The learned Judge, in summing up, told the jury, that, the plaintiff having made out his claim, it lay upon the defendant to get rid of it; and he did so by showing that the plaintiff sold the horse for 125*l.*, and received the money, which then became money had and received to the defendant's use. This cast upon the plaintiff the *onus* of showing that

he had lawfully paid back the money. In order to justify the plaintiff in returning the money, he was bound to make out, either that the money was repaid with the assent of the defendant (of which there was some evidence), or that the contract was void by reason of fraud. The mere breach of warranty did not entitle the purchaser to return the horse, unless that condition was annexed to the contract, or unless fraud had been practised upon him. If a person who sells a chattel warrants it of a certain quality, (which he knows it is not), with a view to increase the price, and in consequence of that falsehood obtains a higher price for it, it is both a legal and a moral fraud. It was for the jury to say whether the defendant had assented to the return of the money, instead of being held liable on his warranty; or, if not, whether the contract of sale was made under circumstances amounting to fraud; in either of which cases they must find for the plaintiff. The jury having found for the plaintiff,

Humfrey now moved for a new trial, on the ground of misdirection:

The learned Judge was wrong in telling the jury that the sale with a warranty, which the vendor knew was false, was a fraud in law.

(PARKE, B.: I left it to the jury to say, whether from the whole evidence they could infer fraud.

PLATT, B.: The facts to constitute fraud must be found by the jury; but whether certain facts as proved amount to fraud is a question of law.)

There was no such *fraud as prevented the property in the horse passing to the vendee. If any fraud were practised, it was by the plaintiff, and there was no evidence that the defendant had any knowledge of it. A guilty agent cannot set up his own fraud as a defence against the claim of his innocent principal. Suppose the money had been paid over by the plaintiff to the defendant before the horse was returned, and that afterwards the purchaser recovered back the price from the plaintiff on the ground of fraud, could the plaintiff then have recovered against the defendant? [*540]

(PARKE, B.: The rule of law is, that, if an agent is guilty of fraud in transacting his principal's business, the principal is responsible: *Cornfoot* v. *Fowke* (1).)

(1) 55 R. R. 655 (6 M. & W. 358).

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POLLOCK, C. B.:

There will be no rule. The defendant claims the money by virtue of a contract made by his agent with a third party. That contract was defeasible by reason of fraud, and was put an end to by the vendee, so that the money does not belong to the defendant. In short, the defendant seeks to set off a sum of money received by the plaintiff; and it turns out, that, before the set-off can be made available, the plaintiff is compelled to pay back the money.

PLATT, B.:

I am of the same opinion. If the defendant adopts the plaintiff's act, he adopts the fraud, and the effect of that fraud. He cannot say, "I adopt your contract so far as to make the money mine; but I do not adopt your contract in so far as it was by your fraud defeasible." If that were so, he might keep both the horse and the price, for the property in the horse re-vested in him when the contract was avoided by the purchaser.

PARKE, B.:

[*541] I am of the same opinion. I directed the *jury in conformity with the law as laid down in *Street* v. *Blay* (1). There was fraud, if, at the time of the sale, a warranty was given that the horse was sound, which induced the other party to enter into the contract, and if in the knowledge of the vendor that statement was false: for it was an untruth told to another with a view to induce him to alter his condition, and thereby altering it. The cases show a distinction between legal and moral fraud. For instance, where a person purports to accept a bill of exchange by procuration, when in fact he has no such authority, that has been held a legal fraud, rendering the party liable to an action of deceit. In this case, in the absence of any other proof, there appears both legal and moral fraud. The plaintiff warrants the horse free from vice, knowing that the other party would not have bought it without a warranty, or believing the statement to be untrue. There is no doubt that, under such circumstances, when the statement turns out to be untrue, the vendee may recover back the price. I am perfectly satisfied that the jury had their attention directed to the state of the law and the facts. The other point, viz. that an agent cannot set up his own fraud against his principal, was not discussed at the trial, but certainly passed in my mind. The answer is, that the

(1) 36 R. R. 626 (2 B. & Ad. 456).

principal never had a right to the 125*l.*, except by the act of his agent in making a contract which was defeasible by reason of fraud. It is true, that fraud does not make the contract actually void, but only voidable at the election of the party; but the moment the purchaser chose to declare it void, the price was recoverable back from the plaintiff, and it ceased to be money in his hands received for the use of the defendant. I am, therefore, clearly of opinion, that the set-off was defeated by the proof of fraud. The plaintiff does not, in truth, set up his own fraud against the defendant, but says, "I only received *that money subject to a defeasance, which has taken effect." Independently, therefore, of the circumstance that the return of the horse was ratified by the defendant, I think there ought to be no rule.

[*542]

PLATT, B., concurred.

Rule refused.

THOMAS WATSON AND ELIZABETH SPENCE *v.* PEARSON.

1848.
May 15, 16.
July 11.

(2 Ex. 581—594; S. C. 18 L. J. Ex. 46.)

[581]

A testator, by his will, dated the 26th July, 1825, devised as follows: "I give and devise unto my wife E., to W. H., and J. C., their heirs, executors, and administrators, all my real and personal estates whatsoever, upon trust to pay the rents, interest, and produce thereof unto my said wife during her lifetime, and after her decease to pay and apply the rents, issues, and profits thereof for and towards the maintenance of my children during their lives, with benefit of survivorship; and, after their several deceases, I give and devise the share of her so dying unto her children and unto his or their heirs, as tenants in common. I give, direct, ordain, and appoint unto my said wife E., to W. H., and J. C., their heirs, executors, and administrators, power and authority to sell, dispose of, mortgage, lease and otherwise in all manners manage my estate, both real and personal, as if I were living. I appoint my wife E., and W. H. and J. C., the executors of this my will, and also guardians of my children." The testator died in 1825, leaving his widow E. (one of the plaintiffs) and three infant daughters unmarried, the youngest of whom died in 1844; and the eldest in 1832 married, and had several children living at the date of the hereinafter-mentioned contract of sale. J. C. never acted under the will, and, in 1833, executed a deed disclaiming all interest under it. The other party, W. H., died in 1840. In 1845, E., the testator's widow, entered into a contract to sell certain land of which the testator was seised in fee simple at the time of his death: Held, in an action by E. against the purchaser for the recovery of the purchase-money, that she took an estate in fee simple in the land in question, and could therefore give a good title.

ASSUMPSIT. The declaration stated, that, by an agreement of the 5th September, 1845, the plaintiffs agreed to sell, and the defendant to purchase, certain land and premises for a certain sum

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of money; and the plaintiffs (*inter alia*) agreed to deduce a good title thereto. The declaration averred, that, although the plaintiffs did deduce a good and sufficient title in fee simple of, and in, and to the said premises, so as to enable the plaintiffs to convey the same to the defendant, &c., of which the defendant had notice, yet the defendant would not complete the purchase, and that he had not paid the said sum of money, &c.

The defendant pleaded, that the plaintiff did not deduce a good and sufficient title in fee simple of, in, and to the said premises, so as to enable the plaintiffs to convey the same to the defendant in fee simple, *modo et formâ*. After issue joined, by consent and by order of PLATT, B., the following case was stated for the opinion of the Court:

[*582] William Spence, at the time of making his will, hereinafter set out, and thence to his death, was seised in fee *of the messuages, lands, tenements, and real estate in his will mentioned, which comprised, amongst others, an undivided moiety of the messuages, lands, and tenements in the declaration mentioned. He made his will on the 26th July, 1825, which was duly executed to pass real estate, and is as follows:

"This is the last will and testament of me, William Spence, of Sculcoates, in the city of York, brewer, made this 26th day of July, 1825. I give and devise unto my dear wife Elizabeth, William Hall, of Sculcoates aforesaid, Esq., Joseph Clarke, of the town of Kingston-upon-Hull, gent., their heirs, executors, and administrators, all my real and personal estates whatsoever, upon trust to pay the rents, issues, and produce thereof unto my said wife during her life, and from and after her decease to pay and apply the rents, issues, and profits thereof for and towards the maintenance of my children during their respective lives, with benefit of survivorship, and from and after their several deceases, I give and devise the share of her so dying unto her children, and his or their heirs, as tenants in common; and if only one of my children shall leave issue, I give and devise the whole of my said real and personal estates unto the heirs, executors, and administrators of such of my said children; and if all my said children shall die without issue under age (but at age I vest their legacies), then I give and devise the same unto and equally between my two brothers-in-law, the sons of my father, in equal shares, as joint tenants. I give, ordain, direct, and appoint unto my said wife Elizabeth, the said William Hall, and the said

Joseph Clarke, their heirs, executors, and administrators, power and authority to sell, dispose of, mortgage, lease, or otherwise in all manners manage my estate, both real and personal, as if I were living; and I exonerate purchasers from seeing to the application of any purchase-money for which they or any of them may give a receipt. I appoint my said wife Elizabeth, *and the said William [*583] Hall and Joseph Clarke, the executors of this my will, and also the guardians of my said children; and I revoke all former wills by me made. In witness whereof I have hereunto set my hand and seal, the day and year first before mentioned.

"WILLIAM SPENCE.

"Signed, sealed, &c. in the presence of us, C. R. A., R. C., S. H."

Mr. Spence died on the 5th August, 1825, leaving his widow, who is one of the present plaintiffs, and three unmarried daughters, who were then of the ages of seventeen, fourteen, and eleven, him surviving: viz. Mary, Jane, and Caroline. The latter departed this life on the 7th of October, 1844; and in the month of March, 1832, the said Mary Spence married William Ouston, of the town of Kingston-upon-Hull; and there have been issue of this marriage several infant children living at the date of the contract of sale hereinafter mentioned, and still living.

The said Joseph Clarke never acted under the will, but on the 13th April, 1833, executed the following deed, disclaiming all interest under the will:

"To all to whom these presents shall come, Joseph Clarke, of &c.—Whereas William Spence, late of the parish of Sculcoates, in the county of York, brewer, duly made and published his last will and testament, bearing date the 21st of July, 1825, whereby he gave and devised unto his wife Elizabeth, William Hall, of Sculcoates aforesaid, Esq., and to the said Joseph Clarke, their heirs, executors, and administrators, all his real and personal estates whatsoever, upon certain trusts therein mentioned, and the said testator appointed his said wife Elizabeth, and the said William Hall and Joseph Clarke, the executors of his said will; and whereas the said William Spence departed this life on or about the 5th day of August, 1825, without having revoked or altered his said *will, which was duly proved in the —— Court of York, on &c., by [*584] the said Elizabeth Spence and the said William Hall, the said Joseph Clarke having renounced probate thereof; and whereas the

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said Joseph Clarke having declined to act in the said executorship, or to accept the trusts of the said will, hath agreed to execute the present disclaimer thereof. Now know ye, that he, the said Joseph Clarke, doth, by these presents, absolutely and irrevocably disclaim all the real and personal estates, trusts, powers, and authorities whatsoever, in and by the said recited will of the said William Spence devised and bequeathed or given to him, along with the said Elizabeth Spence and William Hall, their heirs, executors, and administrators as aforesaid; and the said Joseph Clarke doth hereby covenant and declare, that he has not accepted the devise and bequest contained in the said recited will of the said William Spence, nor any of the trusts and authorities thereby given or reposed in the said Joseph Clarke as aforesaid; nor hath he done, or permitted or suffered to be done, or been party or privy to the doing of any act, deed, matter, or thing whatsoever, which can or may be devised or construed an acceptance thereof, or whereby, or by reason or means whereof, the real and personal estates of the said testator are, can, shall, or may be vested in him, or in any wise impeached, charged, affected, or incumbered, in title, estate, or otherwise howsoever.

"In witness whereof, &c. "JOSEPH CLARKE."

The said William Hall died on or about the 28th day of November, 1840. On or about the 5th of February, 1845, the plaintiffs entered into a contract to convey to the defendant, for valuable consideration, the messuages, lands, and tenements in the declaration mentioned, (of the other undivided moiety of which the said plaintiff Thomas Watson was seised in fee); but the defendant objected, that the plaintiffs could not, under the circumstances, make a good [*585] title in fee simple to a purchaser *for valuable consideration to the moiety of the said messuages, lands, and tenements devised by the will of the said William Spence.

The question for the opinion of the Court is, whether the plaintiffs can make a good title in fee simple to a purchaser for valuable consideration to the moiety of the said messuages, lands, and tenements devised by the will of the said William Spence; if they can, the parties agree that judgment shall be entered for the plaintiffs for the sum of 20*l.*; and, if not, that a *nolle prosequi* shall be entered.

The case was argued in the sittings after last Easter Term (May 15th and 16th), by

Tomlinson, for the defendant:

The question for the opinion of the Court arises upon the construction to be put upon the terms of a very obscure will, the question being, whether the plaintiffs can make a good title to an estate which they have sold to the defendants. It is submitted, that they cannot. Here, one of the trustees having died, and the other disclaimed, the surviving trustee cannot make a good title to the estate. [He cited *Townsend* v. *Wilson* (1), *Hall* v. *Dewes* (2), and *Bradford* v. *Belfield* (3).] Unless the power is given to the surviving [586] trustee he cannot make a good title: Dyer, 177 a, (32). [He also referred to Dyer, 219 a, (8), and Co. Litt. 113 a.] Even supposing [587] the devise to be to trustees in fee, still the power could not be exercised without the concurrence of the trustee who has renounced.

In the next place, the trustees do not take an estate in fee simple, but only a chattel interest. [He cited *Doe* d. *White* v. *Simpson* (4), *Hawker* v. *Hawker* (5), *Doe* d. *Budden* v. *Harris* (6), *Doe* d. *Player* v. *Nicholls* (7), *Barker* v. *Greenwood* (8), *Doe* d. *Shelley* v. *Edlin* (9), *Doe* d. *Cadogan* v. *Ewart* (10), *Adams* v. *Adams* (11), and *Ware* v. *Polhill* (12).] It is therefore submitted, that the plaintiffs could not [588] give a good title to the moiety of the estate in question, as they took only a limited interest, with a power of sale.

Cowling, for the plaintiffs:

It is submitted, the fee simple in the moiety of the property of the testator passed to the trustees by the will in question. The testator commences his will by stating, that he devises all his real and personal estate to the parties therein named, to them and their heirs, and he names them executors. They *clearly take all the personal [*589] property. If the case rested there, the legal estate would also pass. Is there anything in the will to limit this? This is not an estate by implication. It is clear that they must have the legal estate to some extent. The trustees, their heirs, &c. have power to sell, dispose, and mortgage, lease, or otherwise in all manners manage the testator's estate, both real and personal, as if he were then alive. These powers are very extensive. There is nothing to show any

(1) 19 R. R. 398 (1 B. & Ald. 608).
(2) 1 Jac. 189.
(3) 29 R. R. 100 (2 Sim. 264).
(4) 5 East, 162. Stated 46 R. R. 524, 525.
(5) 22 R. R. 471 (3 B. & Ald. 537).
(6) 2 Dowl. & Ry. 36.
(7) 25 R. R. 398 (1 B. & C. 342).
(8) 51 R. R. 666 (4 M. & W. 429).
(9) 43 R. R. 432 (4 Ad. & El. 582).
(10) 45 R. R. 789 (7 Ad. & El. 636).
(11) 66 R. R. 582 (6 Q. B. 860).
(12) 8 R. R. 144 (11 Ves. 257).

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limitation as to time. The cases quoted on the part of the defendant are clearly distinguishable from the present. * * Here the trusts require that the fee should pass, otherwise the trustees might lose the estate when the exigencies of the trust would be most in need of it.

In the second place, the disclaimer of one of the parties does not affect the plaintiffs' title. A devise to certain parties is a devise to those who do not choose to disclaim. (On this point he cited Sugden on Powers, 7th edit., Vol. 1, p. 46.)

[590] In the third place, it may be contended, that the powers are remote. At all events, they are good for the time. The authorities on this point are conclusively in the plaintiffs' favour: 2 Sugden on Powers, 7th edit., p. 470. The main question, however, in the case is, whether the surviving trustee can make a good title. It appears to be admitted by the defendant, that the authorities do not seem to proceed upon any broad ground on this point; and that, in many cases, the Courts have, to a certain extent, frustrated the intention of testators. Here the power (so called) is to be exercised by the same parties as were to have the legal estate. [He referred to *Jones* v. *Price* (1), *Howarth* v. *Smith* (2), and *Bradford* v. *Belfield* (3).

[591] *Tomlinson* replied.

Cur. adv. vult.

The judgment of the COURT was now delivered by

PARKE, B.:

This was a special case, the only point being, whether the plaintiffs could make a good title to an estate which they had agreed to sell to the defendant. The question turns entirely on the construction to be put on the will of William Spence, the husband of the plaintiff, Elizabeth Spence. The will was dated on the 26th of July, 1825, and is as follows: "This is the last will and testament of me, William Spence, of Sculcoates, in the county of York, brewer, made this 26th day of July, in the year 1825. I give and devise unto my dear wife Elizabeth, William Hall, of Sculcoates aforesaid, Esquire, and to Joseph Clarke, of the town of Kingston-upon-Hull, gentleman, their heirs, executors, and adminstrators, all my real and personal estates whatsoever, upon trust to pay the rents, interests, and produce thereof unto my said wife during her life, and, from and after her

(1) 54 R. R. 435 (11 Sim. 557).
(2) 6 Sim. 161.
(3) 29 R. R. 100 (2 Sim. 265).

decease, to pay and apply the rents, issues, and profits thereof for and towards the maintenance of my children during their respective lives, with benefit of survivorship; and, from and after their several deceases, I give and devise the share of her so dying unto her children, and his or their heirs, as tenants in *common; and, if only one of my children shall have issue, I give and devise the whole of my said real and personal estates unto the heirs, executors, and administrators of such of my said children; and, if all my said children shall die without issue under age (but at age I vest their legacies), then I give and devise the same unto and equally between my two brothers-in-law, the sons of my father, in equal shares, as joint-tenants. I give, ordain, direct, and appoint unto my said wife Elizabeth, the said William Hall, and the said Joseph Clarke, their heirs, executors, and administrators, power and authority to sell, dispose of, mortgage, lease, or otherwise in all manners manage my estate, both real and personal, as if I were living; and I exonerate purchasers from seeing to the application of any purchase-money, for which they or any of them may give a receipt. I appoint my said wife, Elizabeth, and the said William Hall and Joseph Clarke, the executors of this my will, and also the guardians of my said children; and I revoke all my former wills by me made."

[*592]

The testator died soon after the date of his will, leaving the plaintiff, Elizabeth Spence, his widow, and leaving three infant daughters, one of whom died in 1844, and another of whom has married, and has issue several infant children. Clarke, one of the trustees, never acted, but, on the 13th of April, 1833, executed a deed of disclaimer, disclaiming all the devises and bequests contained in the will. William Hall, another of the trustees, died in 1840, and, in September, 1845, the plaintiffs contracted to sell the estate in question to the defendant. It is admitted, that the plaintiff Watson is seised in fee of one moiety, and that the testator was, at the date of his will, and thenceforth up to his death, seised in fee of the other moiety. The question therefore is, whether the plaintiff, Elizabeth Spence, can make a good title to the testator's moiety?

On the part of the defendant, it was argued, that she cannot. It was contended, that though the devise was of *all the testator's real and personal estate to the trustees, their heirs, executors, and administrators, yet the objects of the trust were not such as to require a fee simple; and so that the trustees took only a limited interest, namely, an estate during the lives of the widow and children, with a power of sale appendant; and, secondly, if this were so, then

[*593]

WATSON v. PEARSON.

that the power could not be executed so as to give a valid title by reason of the death of Hall and the disclaimer of Clarke. We are of opinion, however, that the defendant's objection cannot be sustained. It is certainly true, that where the purposes of the trust on which an estate is devised to trustees are such as not to require a fee in them; as for instance where the trust is to pay annuities, or to pay over rents and profits to a party for life, there, if, subject to the specified trusts, the estate is given over, the parties taking under such devise over have been held to take legal estates: the estate given to the trustees (even when given with words of inheritance) having been in such cases taken to have been meant to be co-extensive only with the trust to be performed. This rule of construction has probably created much more difficulty than it has obviated. It is however too well settled to be now called in question. But we do not think it is applicable to a case like the present. The general rule is, that where an estate is given to trustees, all the trusts which they are to perform must, *primâ facie* at least, be performed by them by virtue and in respect of the estate vested in them. Here the interest derived is in terms at least an interest in fee simple. One of the duties imposed on the trustees is, if they should deem it expedient, to sell the estate. This they can only do by exercising dominion over the fee-simple; and in such a case, even without words of inheritance, there would be strong reason for holding that they were intended to take the fee. But it is not necessary here to go that length. The fee is in terms devised to them, and it would [*594] be a very *strained and artificial construction to hold, first that the natural meaning of the words is to be cut down because they would give an estate more extensive than the trust requires, and then, when the trust does in fact require the whole fee simple, to hold that that must be supplied by way of power, defeating the estate of the subsequent devisees, and not out of the interest of the trustees.

The present case very closely resembles that of *Doe* d. *Cadogan* v. *Ewart* (1), where the trustees were held to take the fee. The only authority at all at variance with the view we take on this subject is that of *Hawker* v. *Hawker* (2). But in the facts of that case there were some peculiarities, and, no reasons being given for the certificate, we are unable to ascertain the principle on which the Court proceeded.

Taking it, therefore, that the fee vested in the trustees, it follows necessarily, that Elizabeth Spence, as the sole trustee, can sell in

(1) 45 R. R. 789 (7 Ad. & El. 636). (2) 22 R. R. 471 (3 B. & Ald. 537).

pursuance of the trust. For whatever be the doubts in case of powers, there is no question but that, in case of a devise to trustees upon trust to deal with the estate in a certain manner, the trust is *primâ facie* to be executed by the trustees or trustee for the time being. Here, by the disclaimer of Clarke and the death of Hall, Elizabeth Spence has become the sole trustee, and may therefore well execute her trust by selling the estate.

There must therefore be

Judgment for the plaintiffs.

FAULKNER *v.* RICHARD LOWE (1).

1848. *June* 12.

(2 Ex. 595—597.)

[595]

No action will lie on a covenant by C. to pay a sum of money to A., B., and himself C., or the survivors or survivor of them on their joint account.

COVENANT. The declaration stated that, in the lifetime of one Robert Lowe, to wit, on the 29th of September, 1841, by a certain indenture then made between the defendant of the one part, and the plaintiff and the said Robert Lowe, since deceased, of the other part (*profert*), reciting, that the defendant and the plaintiff and the said Robert Lowe, were possessed of, and interested in, divers monies on a joint account, and that the defendant had requested the plaintiff and the said Robert Lowe to lend and advance thereout to him, the defendant, the sum of 1,600*l.*; the defendant, for himself, his heirs, executors, &c., covenanted with the said Robert Lowe and the plaintiff, their heirs, executors, &c., that he, the defendant, his heirs, executors, &c., would pay, or cause to be paid, the sum of 1,600*l.*, with interest for the same after the rate of 5*l.* per cent. per annum, on the 29th day of March then next, without deduction, unto them the said Robert Lowe, the plaintiff, and himself the defendant, or the survivors or survivor of them, upon the joint account aforesaid. Breach—non-payment.

The defendant demurred, having set out on *oyer* the indenture, whereby, after reciting, "That Richard Lowe (the defendant), the said Robert Lowe, and Samuel Faulkner (the plaintiff) were possessed of, and interested in, divers monies on a joint account, and the said Richard Lowe had requested the said Robert Lowe and Samuel Faulkner to lend and advance thereout to him, the said Richard

(1) Doubted by WILLIAMS, J., in *Aulton* v. *Adkins*, 18 C. B. (N. S.) 249, 253; but see per BOWEN, L. J., in *In re Hoyle* [1893] 1 Ch. 84, 99, 62 L. J. Ch. 182.—J. G. P.

FAULKNER v. LOWE.

Lowe, the sum of 1,600*l.*, which they had agreed to do; it was witnessed, that, in consideration of 1,600*l.*, paid by Robert Lowe and Samuel Faulkner to Richard Lowe, or, with the permission of
[*596] the said Robert Lowe *and Samuel Faulkner, retained by the said Richard Lowe, to his own sole use, out of the monies belonging to them, the said Robert Lowe, Samuel Faulkner, and Richard Lowe, upon a joint account as aforesaid," Richard Lowe conveyed to Robert Lowe and Samuel Faulkner certain premises in fee, subject to the following proviso, which was the covenant declared on: "Provided always, that, if the said Richard Lowe, his heirs, executors, &c., shall pay, or cause to be paid, unto them, the said Robert Lowe and Samuel Faulkner, and himself the said Richard Lowe, and the survivors or survivor of them, their or his executors, &c., upon the joint account aforesaid, the sum of 1,600*l.*, with interest for the same at the rate of 5*l.* per cent. per annum, on the 29th day of March next, without deduction, then, immediately after such payment," the said premises shall be reassured, &c. Joinder in demurrer.

T. Jones, in support of the demurrer:

No action will lie on this covenant, which is, in effect, a contract by the defendant to pay the money to himself. It makes no difference that the covenant is in terms with the plaintiff to pay the money to him and the defendant; for both being jointly interested in the sum a payment to the defendant himself would be a performance of the covenant. That, however, is impossible. Pothier, in his Traité des Obligations (1), points out the distinction between a thing possible in itself, and a thing absolutely impossible; in the former case, he says, the obligation subsists, notwithstanding it is beyond the means of the person obliged to accomplish it, and he is answerable for the damage occasioned by the non-performance of his engagement; but, in the latter case, the party is discharged from his obligation, because no man can be obliged to perform an impossibility. It is difficult to see what damages could be assessed
[*597] against *the defendant for non-payment to himself. Besides, the defendant, being jointly interested in this money, and being a party to the deed, ought to have been a co-plaintiff on the record.

Martin, contrà:

The performance of the covenant is not impossible.

(1) P. 1, ch. 1, sect. 4, s. 2, 132.

(POLLOCK, C. B.: If the covenant had been to place the money in the funds in certain names, one of which was the defendant, there would have been no difficulty; but this is a covenant by the defendant to pay himself. Suppose the defendant had pleaded that he had paid the money to himself, and then held it on the joint account?)

The meaning of the covenant is, that the parties should be placed *in statu quo.*

(ROLFE, B.: If both covenantees had died before the 29th of March, then, the defendant being the survivor, the money would have been payable to him alone.)

In that case, there might be difficulty in performing the covenant; but, one of the covenantees being alive, the question does not arise. In *Rose* v. *Poulton* (1), there was a covenant by D., E., and C., and each and every of them, with A., B. and his wife, and C., to pay an annuity; and it was held, that, at least, after C.'s death, A. and B. might sue on the covenant, although it was entered into both by and to C.

(ALDERSON, B.: This is not a covenant to pay A., B., or C., but to pay A., B., and C., on their joint account.

POLLOCK, C. B.: The covenant, to my mind, is senseless. I do not know what is meant, in point of law, by a man paying himself.)

Per CURIAM (2):

There must be judgment for the defendant.

MAILE *v.* MANN.

1848. *July* 13.

(2 Ex. 608—611; S. C. 6 Dowl. & L. 42; 17 L. J. Ex. 336.)

[608]

Where a bailiff is employed by an attorney to issue execution against a defendant, the attorney, and not the client, is liable to the bailiff for his fees.

ASSUMPSIT by the plaintiff, as bailiff of the Sheriff of Cambridgeshire, for work and labour in executing a writ, and keeping a certain person arrested by the plaintiff at the request of the defendant, under the said writ. Plea, *non assumpsit;* upon which issue was joined. At the trial, before Platt, B., at the Westminster sittings,

(1) 36 R. R. 761 (2 B. & Ad. 822).

(2) POLLOCK, C. B., ALDERSON, B., ROLFE, B., and PLATT, B.

MAILE v. MANN.

in Michaelmas Term last, it appeared that the present action was brought to recover the sum of 3*l.* 3*s.* for arresting and conveying to Cambridge gaol a person named Payne, against whom the defendant had obtained a judgment. The defendant had instructed his attorney, a Mr. Wilkin, to proceed against Payne for the recovery of a claim due by him on a promissory note. The action was brought against Payne in the name of Mr. Wilkin's town agent, and judgment therein was obtained against him. Under the instructions of the defendant, Wilkin ordered his agent to issue a *ca. sa.* against Payne. The London agent accordingly sued out execution, and sent the writ to the under-sheriff, with instructions that it should be delivered to the plaintiff, the sheriff's bailiff. It was contended, that, under these circumstances the plaintiff ought to be nonsuited, on the ground that the action was improperly brought against the client, and that it ought to have been against the attorney. Under his Lordship's direction the plaintiff had a verdict, leave being reserved to the defendant to move to enter a nonsuit.

O'Malley having obtained a rule accordingly,

Huddleston showed cause in Trinity Term last (May 30):

The present action was rightly brought against the client, and he
[*609] is liable to the plaintiff. The question *really is, with whom was the contract made? In *Robins* v. *Bridge* (1) it was held, that the attorney in a cause is not personally liable to a witness whom he subpœnaes to give evidence in a cause, for his expenses of attendance. The action, therefore, was not maintainable against the attorney, who acts merely as an agent, with a disclosed principal. So, in *Maybery* v. *Mansfield* (2) it was held, that the attorney of the execution plaintiff is not liable to the sheriff for the fees due on the execution of a writ of *ca. sa.* ERLE, J., there says, "The law is, that the client is liable in such a case as this." In *Hartop* v. *Juckes* (3) it was held, that the solicitor under a commission of bankruptcy is not liable, in the first instance, to the messenger whom he nominates, for his bill of fees. In *Newton* v. *Chambers* (4) the Court of Queen's Bench held, that a sheriff's officer may maintain an action against the attorney of the plaintiff in the original suit, for caption fees, and conduct money, on proof of an employment by

(1) 49 R. R. 531 (3 M. & W. 114).
(2) 16 L. J. Q. B. 102.
(3) 2 M. & S. 438.
(4) 1 Dowl. & L. 869.

the attorney; and that it is the usual course of business for the attorney to be charged with, and to pay such fees.

(POLLOCK, C. B.: In *Maybery* v. *Mansfield*, the case of *Robins* v. *Bridge* was not cited.)

It was cited in *Seal* v. *Hudson* (1), and there COLERIDGE, J., seemed to think that the officer could not bring his action against the attorney.

(ALDERSON, B.: The cases of *Foster* v. *Blakelock* (2), and *Walbank* v. *Quarterman* (3), are against you.)

Those cases are distinguishable from the present, for there the attorney decidedly employed the plaintiff.

(ALDERSON, B.: The question is, whether the attorney has any authority to pledge his client's credit in a matter where it is the custom for the attorney to pay the fees out of his pocket, where, in fact, it is a ready money transaction. If the bailiff chooses to give credit, he *must look to the party to whom he really gave credit.) [*610]

He also cited *Hart* v. *White* (4).

The COURT said they would call on the defendant's counsel, if necessary.

Couch, contrà, was not called on.

Cur. adv. vult.

ROLFE, B., now said:

In this case, which was argued before us on the 30th of May last, we are of opinion that the rule to enter a nonsuit must be absolute. The action is brought by the plaintiff, a bailiff of the Sheriff of Cambridgeshire, against the defendant, to recover the sum of 3*l.* 3*s.* for the plaintiff's trouble in executing a writ of *ca. sa.* issued against a third party, at the suit of the defendant and at his request. The defendant pleaded *non-assumpsit.* It was objected, at the trial, that the defendant was not liable, but that the defendant's attorney was the party who ought to have been sued; and upon this ground a rule was obtained to enter a nonsuit. The case was argued before us by *Mr. Huddleston*, on the part of the

(1) 4 Dowl & L. 760.
(2) 29 R. R. 558 (5 B. & C. 328).
(3) 71 R. R. 289 (3 C. B. 94).
(4) Holt, N. P. 376.

MAILE v. MANN.

plaintiff, *Mr. Couch* appearing for the defendant, and the COURT took time to consider their judgment. The case of *Foster* v. *Blakelock* decides that a sheriff's officer, who has been employed by an attorney to execute writs for him, may maintain an action against the attorney for the fees usually paid on such occasions. In *Walbank* v. *Quarterman* it was decided, that an attorney who employs a sheriff's bailiff is liable to him for his fees, and that the client is not liable, there being no privity between him and the officer. These cases are expressly in point. The plaintiff, on the other hand, relied on the case of *Maybery* v. *Mansfield*. That [*611] decision, however, is not at variance with *Walbank* *v. *Quarterman*; for, in the former case, the action was by the sheriff, whose right of action depends upon statute and not upon contract. The plaintiff also relied on *Seal* v. *Hudson*, in the Bail Court, where my brother COLERIDGE appears to have held, that the sheriff's officer could not sue the attorney except under very special circumstances. It does not, however, appear that the learned Judge's attention was called to all the cases on the subject. If, however, *Seal* v. *Hudson* is to be considered at variance with *Foster* v. *Blakelock* and *Walbank* v. *Quarterman*, and this Court is compelled to choose between conflicting authorities, we prefer adhering to the two latter decisions. The rule must therefore be absolute to enter a nonsuit.

Rule absolute.

1848.
May 1.
July 11.

RICHARDS *v.* LORD SUFFIELD (1).

(2 Ex. 616—622; S. C. 6 Dowl. & L. 22; 17 L. J. Ex. 362; 12 Jur. 731.)

[616]

The 26th section of the Solicitors Act, 1843, only disables an uncertificated attorney from suing for fees, rewards, or disbursements for any business, matter, or thing done by him as an attorney or solicitor in some suit or proceeding in one of the Courts mentioned in the Act, and not for business done which had no reference to such suits or proceedings.

ASSUMPSIT in 500*l.* for the work and labour, care, diligence, journies, and attendances of the plaintiff, by him done, performed, and bestowed, as the attorney and solicitor of and for the defendant, at his request; and for fees due and of right payable to the plaintiff in respect thereof; and for materials and necessary things by the plaintiff provided in and about the said work, &c.; and in 500*l.* for other work and labour done by the plaintiff for the defendant at his request; and in 500*l.* for money paid. Plea as to the first, second, and third counts, that the plaintiff, under and by virtue of

(1) *Greene* v. *Reece* (1849) 8 C. B. 88.

the said first, second, and *third counts, claims and seeks to recover against the defendant in this action certain fees, rewards, and disbursements, for and in respect of certain business, matters, and things theretofore done by the plaintiff as an attorney and solicitor, for him, the defendant; and that, at the time the said business, matters, and things were done by the plaintiff as aforesaid, to wit, on &c., he, the plaintiff, as such attorney and solicitor as aforesaid, did then carry on certain proceedings, to wit, conduct and manage a certain cause in which J. G. was plaintiff, and the now defendant defendant, in the Court of Exchequer at Westminster, without having previously obtained or then having a stamped certificate then in force, contrary to the form of the statute in such case made and provided; and that the said business, matters, and things, for the recovery of the fees, rewards, and disbursements in respect of which this action is brought, and each and every of them, were and was done by the plaintiff as such attorney and solicitor as aforesaid, whilst he was without such certificate as last aforesaid. Verification. [*617]

Special demurrer, assigning for causes (amongst others), that it does not appear by the plea that the business, &c., done by the plaintiff as an attorney and solicitor, in respect of which the fees in the first, second, and third counts are alleged to be claimed, were done by the plaintiff in suing, prosecuting, defending, or carrying on any action or suit, or any proceeding in any of the Courts mentioned in the statute: nor does it appear at what time of the year the work was done, which might have been between the 15th of November and the 16th of December; in which case the plaintiff might have obtained a certificate after the business was done, and before the 16th of December.

The case was argued in Easter Term, last, (May 1st), by

S. Temple, in support of the demurrer:

The plea, which *purports to be framed under the 26th section of 6 & 7 Vict. c. 73, is bad, chiefly on the ground that it does not state that the business for which the plaintiff now seeks to recover remuneration related to any action or suit, or other proceeding, in any Court mentioned in the Act. The 26th section enacts, "that no person, who as an attorney or solicitor shall sue, prosecute, defend, or carry on any action or suit, or any proceedings, in any of the Courts aforesaid, without having previously obtained a stamped certificate, which shall be then in force, shall be capable of maintaining any action or suit at law or in equity, for the recovery [*618]

RICHARDS v. SUFFIELD.

of any fee, reward, or disbursement for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid, whilst he shall have been without such certificate as last aforesaid." As this section is highly penal, it ought to be strictly construed. (He was then stopped by the COURT, who called upon)—

Hurlstone, in support of the plea:

The plea is sufficient; it follows the precise terms of the section.

(PLATT, B.: Do not the words "as an attorney or solicitor as aforesaid," in that section, refer to the work done by them in actions, &c.?)

The defendant contends, that an attorney who is uncertificated is disqualified from suing for fees, for any work, &c., which he may have done, whether such work, &c., was done in one of the Courts mentioned in the Act or not. By the stat. 25 Geo. III. c. 80, attornies and solicitors were required to take out certificates annually, and, in case they acted without one, they were subjected, by the 7th section of that Act, to a penalty of 50*l.*; and the latter part of that section also enacts, that they shall be, and are hereby "made incapable to maintain or prosecute any action or suit in any court of law or equity, for the recovery of any fee, reward, or disbursements on account of prosecuting, carrying on, or defending any such action, *suit, or proceeding." It is to be observed, that the language in that section, and in the 30th section of the 37 Geo. III. c. 90, is identical, but the Legislature, though treating of the same subject, in the 6 & 7 Vict. c. 73, s. 26, uses language wholly different. By the 31st section of the 37 Geo. III. c. 90, if an attorney had not taken out his certificate for a year, his admission was void, and he was off the roll: *Wilton* v. *Chambers* (1); but this is now repealed by the 6 & 7 Vict. c. 73, s. 1. It is, therefore, submitted, that the Legislature, by having removed certain penalties to which attornies and solicitors were liable, and by using different language in the 26th section of the 6 & 7 Vict. c. 73, intended that the penalty, that an uncertificated attorney or solicitor should not be able to recover for any business done in that capacity, should be substituted for the penalty of being off the roll. The language of the 35th and 36th sections of the present Act is more restricted than that of the 26th section. If, therefore, it had been the intention of the Legislature to have confined the penalty

[*619]

(1) 7 Ad. & El. 524.

imposed by the 26th section to the business done in the Courts mentioned in the Act, the same language would have been used as was adopted in the older Acts, and in the other sections of the present Act. * * (He also argued, in answer to the other objection, that, if the business was, in fact, done between the 15th of November and the 16th of December, the plaintiff should have replied that matter; and cited *Jones* v. *Axen* (1), *Washbourn* v. *Burrows* (2), *Thibault* v. *Gibson* (3).)

[620]

S. Temple, in reply:

The plea is insufficient, for the 26th section of the statute does not bear the construction for which the defendant contends. The plea is bad, for not showing that the plaintiff was an attorney within the statute. A person may do work as attorney without acting as an attorney-at-law, as, for instance, in Parliament in passing a bill, or at an election. But the plea does not state that the business was done by the plaintiff in the capacity which is pointed out by the 2nd and 3rd sections; and the words "an attorney or solicitor as aforesaid," mean an attorney or solicitor within the meaning of the preceding clauses of the Act.

Cur. adv. vult.

The judgment of the COURT was now delivered by

PARKE, B. (After stating the pleadings, and the demurrer, his Lordship proceeded):

The principal objection to this plea, on the argument of the demurrer, was, that it does not appear by it that the action was brought for "fees, rewards and disbursements," within the meaning of the 26th sect. of the 6 & 7 Vict. c. 73, the plaintiff's counsel contending that this section disables an attorney, who is uncertificated, only from suing for fees, rewards, or disbursements for any business, matter, or thing done by him as an attorney or solicitor, in some suit or proceeding in one of the Courts mentioned in the Act, and not for business done *which had no reference to such suits or proceedings; and we are of that opinion.

[*621]

The 26th section provides, "that no person, who as an attorney or solicitor shall sue, prosecute, defend, or carry on any action or suit, or any proceedings, in any of the Courts aforesaid, without having previously obtained a stamped certificate, which shall be

(1) 1 Ld. Ray. 119.
(2) 74 R. R. 605 (1 Ex. 107).
(3) 12 M. & W. 88.

RICHARDS v. SUFFIELD.

then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement, for or in respect of any business, matter, or thing done by him as an attorney or solicitor as aforesaid, whilst he shall have been without such certificate as last aforesaid."

The question is, what meaning we are to attribute to the words of reference in the expression, "as an attorney or solicitor as aforesaid." We think they must necessarily refer either to an attorney or solicitor acting as described in the commencement of that section, or to the previous description of an attorney and solicitor in the 2nd section; and in the former case the disability will be confined to suits for fees, &c. due for business done as an attorney, in suing, prosecuting, defending, or carrying on any action or suit, or any proceedings in any of the Courts aforesaid; in the latter, for fees due to an attorney, &c., acting as such, in suing out any writ or process, or commencing, carrying on, soliciting or defending any action, suit, or other proceeding in the name of any other person, or in his own name, in any of the Courts mentioned in the 2nd section, including proceedings before one or more justices; so that it really makes no difference whether the words "as aforesaid" relate either to the beginning of the 26th section or to the 2nd. To one or the other they certainly do refer; and, in either, the disability to sue is confined to fees, &c. connected with a suit.

It was, however, argued by *Mr. Hurlstone*, that the difference of
[*622] the language of the Legislature, in the 35th and *36th sections, from that in the 26th, indicated a different intention in the Legislature.

The 35th section provides, that, if any person not admitted and enrolled sues out any writ or process, or defends an action, he shall be incapable of maintaining an action for any fee, &c., on account of prosecuting, carrying on, or defending any such action, suit, or proceeding, or otherwise in relation thereto; and a similar provision is made if any person shall commence, or carry on, or defend an action in the county court. The language being more general in the 26th section, it was contended, that the restriction in that section was meant to be more extensive.

It appears to us, that the words of reference, "as an attorney or solicitor as aforesaid," confine the disability to the same class of fees, rewards and disbursements as those pointed out expressly in the 35th and 36th sections. This being so, the plea is, in our opinion, defective, in not averring that the fees, &c., were due to the plaintiff, as an attorney, in prosecuting or defending a suit or proceeding in

a Court; they are not even stated to be due to him as an attorney-at-law, and they might be payable to him as an attorney acting before arbitrators, or a compensation jury, or transacting business under a power of attorney for the defendant.

Judgment for the plaintiff.

KING *v.* COLE.

1848.
June 22, 23.

(2 Ex. 628—633; S. C. 17 L. J. Ex. 283.)

An admission in a deed signed and sealed at one date and delivered at a later date operates as an admission made at the latter date. [628]

ASSUMPSIT on a guarantie. The declaration stated, that one Joseph Wilkinson was indebted to the plaintiff in a certain sum; and thereupon, in consideration that the plaintiff would agree to accept payment by instalments, of the said debt from the defendant, and would execute an indenture, purporting to be made by and between &c., (describing it,) and thereby release unto the said J. Wilkinson the said debt, the defendant promised to pay the debt by instalments. Averment, that the plaintiff did agree to accept payment of the debt by instalments, and did execute the said indenture, and did thereby release the said J. Wilkinson. Breach, nonpayment of the instalments.

The defendant pleaded *non assumpsit*, and a traverse that the plaintiff executed the said indenture *modo et formâ*; upon which pleas issue was joined. At the trial *of the cause, before Rolfe, B., [*629] at the last Spring Assizes at Liverpool, the present case was immediately preceded by one of *Hassall* v. *Cole*, in which the pleadings were the same. In support of the second issue, a deed was produced, but was rejected, as being improperly stamped; and the plaintiff then produced the following guarantie:

"MR. JOHN HASSALL,—In consideration of your having, by indenture bearing date the 18th day of February, 1847, agreed to accept payment of the debt owing to you by J. Wilkinson, of Birkenhead, amounting to the sum of 650*l.*, by the following instalments: that is to say, the sum of 325*l.*, part thereof, being at the rate 10*s.* in the pound, on the 18th day of August, 1847, and the sum of 325*l.*, the residue of the said debt, on the 18th of February, 1848, and of your having, by the same indenture, released the said J. Wilkinson from such debt, I do hereby guarantee to you the payment of such debt or sum of 650*l.*, at the times and in manner aforesaid. Dated this 18th of February, 1847.

"WILLIAM COLE."

KING v. COLE.

It was proved that Cole signed agreements in this form, addressed to each of Wilkinson's creditors, and delivered them to his attorney, who carried them, with the indenture, to his creditors, each of whom, when he executed the deed, received his signed guarantie from the attorney at the same time. It was contended, on the part of the plaintiff, that the guarantie was an admission by the defendant, that the plaintiff had released Wilkinson, and was original evidence of such release, though the indenture was not read. It was objected, for the defendant, that the guarantie was no admission of a past release, but rather of a future one; in which latter case there was a variance between the guarantie and the declaration, which was open under *non assumpsit*. It was [*630] also objected, that *there was a variance, as the guarantie did not admit such a release as that stated in the declaration. The learned Judge reserved leave to the defendant to move to enter a nonsuit, if the Court should be of opinion that the amendment ought not to have been made, reserving power to the plaintiff to amend the declaration, if the Court should think fit.

The present case of *King* v. *Cole* was then called on; and, it being agreed that the pleadings and facts in all respects were the same as those in *Hassall* v. *Cole*, a similar verdict was entered, with similar leave to move,—the same evidence to be evidence in both cases.

Knowles moved accordingly, and obtained a rule *nisi* for a nonsuit, or for a new trial, on the ground that there was no evidence to support the averment of the release; but, on the other grounds, the COURT refused the rule.

Martin and *Tomlinson* showed cause (June 22):

The only question is, whether there was evidence to support the averment in the declaration, that the plaintiff executed the release; and it is submitted that there was. The cases of *Slatterie* v. *Pooley* (1), and *Howard* v. *Smith* (2), are expressly in point. In the former of these, the rule was laid down, that a parol admission by a party to a suit is always receivable in evidence against him, although it relates to the contents of a deed or other written instrument, and even though its contents be directly in issue in the cause. In the latter case, TINDAL, Ch. J., in delivering the judgment of the COURT, concluded by saying, "We are of opinion that the statements made

(1) 55 R. R. 760 (6 M. & W. 664). (2) 60 R. R. 506 (3 Man. & G. 254).

by the plaintiff himself, of the terms upon which he was actually holding the premises, were admissible against him, notwithstanding what had passed respecting the written agreement under which the *former tenant had held; and that the present case must be governed by the law, as laid down in *Slatterie* v. *Pooley*." If the deed had been destroyed, this instrument would have been secondary evidence for the jury; and, according to the preceding cases, it is original evidence of the deed.

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Knowles, contrà:

The terms of the guarantie, "in consideration of your having by indenture," as taken with all the surrounding circumstances, will bear two significations—either that the plaintiff would execute a release, or that he had executed one. In the latter case, the declaration, which states an executory consideration, would not be supported. If the former construction be adopted, it is no evidence to prove the averment that the deed had been executed. In either view, the plaintiff must fail. Then the evidence is, that the guarantie was signed and delivered by the defendant to his attorney, to be handed over to the plaintiff, and at that time no deed had been executed.

(ALDERSON, B.: It is to be taken as an admission at the time it is handed over to the party. The party who hands it over is the agent to make the admission.

ROLFE, B.: It would have been no admission if it had been immediately destroyed, without being handed over.)

It cannot be construed to be both past and future, for two different purposes.

(ROLFE, B.: May it not be taken as contemporaneous, and then it could stand both ways?)

Cur. adv. vult.

The judgment of the COURT was now delivered by

ALDERSON, B.:

The question in this case is, whether there is any evidence of the averment in the declaration, that the plaintiff, by the indenture, dated &c., released the debt due to him from J. S. The admissions

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put in prove that the indenture described in the declaration was executed; *but they go no further. They do not show what the [*632] operation of that indenture was.

The only evidence of this suggested by the counsel for the plaintiff was the guarantie itself. That guarantie was as follows:

"MR. JOHN HASSALL,—In consideration of your having, by indenture bearing date the 18th day of February, 1847, agreed to accept payment of the debt owing to you by J. Wilkinson, of Birkenhead, amounting to the sum of 650*l.* by the following instalments: that is to say, the sum of 325*l.*, part thereof, being at the rate of 10*s.* in the pound, on the 18th day of August, 1847, and the sum of 325*l.*, the residue of the said debt, on the 18th of February, 1848, and of your having, by the same indenture, released the said J. Wilkinson from such debt, I do hereby guarantee to you the payment of such debt or sum of 650*l.* at the times and in manner aforesaid. Dated this 18th of February, 1847.

"WILLIAM COLE."

This guarantie was signed by the defendant at an antecedent period; but, being delivered to his attorney, to be handed over to the plaintiff, we think that it must be considered as an admission made by the defendant on the day on which it was so handed over, and is the same as if it had been written or spoken by the defendant at that time. And, if it be so, it is clear that an admission, either verbal or in writing, by him of the contents of a deed, would be sufficient proof as against him of those contents.

What, then, is the true construction of the guarantie?

If, by the words "having released," we are to understand an admission by the defendant, that at some antecedent period the plaintiff had released, the guarantie will show the truth of the averment. But then the declaration would not be proved if this were the true construction.

[633] On the other hand, the Court may treat those words as meaning, that, if at some future time the plaintiff shall have released the debt, the defendant will guarantee the same to him. If this be so, the declaration, indeed, will be supported, but the admission will not prove the averment, that, in fact, such a release was executed by the plaintiff.

We think this is the true construction of this guarantie, under all the circumstances of this case.

It would be sufficient, however, to say, that an admission offered

by the plaintiff in evidence, but capable equally of either construction, would not be sufficient proof of an averment in a case in which the affirmative lies on the plaintiff.

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We think, therefore, that there must be a new trial.

FREEMAN AND ANOTHER *v.* COOKE (1).

1848. *June* 22. *July* 11.

(2 Ex. 654—664; S. C. 6 Dowl. & L. 187; 18 L. J. Ex. 114; 12 Jur. 777.)

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In trover by the assignees of a bankrupt against a sheriff, for the conversion of the bankrupt's goods, seized under a *fi. fa.* against C. and D., it appeared, that, immediately before the seizure, the bankrupt told the officer that the goods were the property of C.; and, immediately afterwards, he contradicted that statement, and said they were the goods of D. The jury found, that the goods were in reality the bankrupt's; but also, that he represented the goods to the officer as the goods of C., so as to induce the officer, by that false representation, to seize them: Held, that, under the plea of not possessed, this finding did not estop the bankrupt, and the plaintiffs as assignees, from complaining of the seizure of the goods as their own.

The rule laid down by the Court of Queen's Bench, that, "where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time;" and, again, "a party who negligently or culpably stands by, and allows another to contract on the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the party whom he has himself assisted in deceiving," is to be taken with this explanation, that, by the term "wilfully," must be understood, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real meaning may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and that conduct, by negligence or omission, when there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect.

TROVER by the plaintiffs, as assignees of William Broadbent, for the conversion of certain goods of the bankrupt before the bankruptcy. The defendants pleaded Not guilty, not possessed, and leave and license. The plaintiffs joined issue upon the two first pleas, and traversed the last, upon which traverse issue was joined. At the trial, before Alderson, B., at the last Liverpool Spring Assizes,

(1) See *McKenzie* v. *British Linen Co.* (1881) 6 App. Cas. 82, 101, 109; *Jorden* v. *Money* (1854) 5 H. L. C. 185, 214, 225, 23 L. J. Ch. 865; *Clarke* v. *Hurt* (1858) 6 H. L. C. 633, 656, 27 L. J. Ch. 615; *Miles* v. *McIlwraith* (1883) 8 App. Cas. 120, 133, 52 L. J. P. C. 17; *Henderson & Co.* v. *Williams* [1895] 1 Q. B. 521, 533, 64 L. J. Q. B. 308, C.A.—J. G. P.

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it appeared that the defendant was the Sheriff of Yorkshire, and that his officers had seized the goods in question, under a writ of *fi. fa.*, against Joseph and Benjamin Broadbent; that William Broadbent, in anticipation of a distress, had removed the goods, (which there was evidence to show were his,) to the house of his father Joseph, and afterwards to the house of his brother Benjamin; that, when the officers entered Benjamin's house, the bankrupt told them they were the goods of his brother Benjamin, (supposing, as it would seem, that the writ was against himself). The writ, being produced, was against Benjamin. William then told the officers that the goods belonged to another brother, and, finally, that they were his [*655] *own. The goods were then seized, and sold as those of Benjamin. It was contended, by the defendant's counsel, that the statements and conduct of the bankrupt operated as conclusive evidence against him; that the property was not his at the time of the conversion, and that the assignees were also bound. The jury found, that the goods were, in fact, William's, and also, "that William represented the goods to the sheriff's officers as the goods of Benjamin, so as to induce them, by that false representation, to seize the goods." The plaintiff, under the direction of the learned Judge, obtained a verdict, leave being reserved to the defendant to move to enter a verdict in his favour on any of the issues.

Knowles having obtained a rule accordingly,

Watson, *Atherton*, and *H. Hill* showed cause (June 22):

In this case the jury found, that the goods were the goods of [William (1)], although they also found, that the officers were misled by his misrepresentation that the goods belonged to his brother. No doubt, the statements and representations of the bankrupt were evidence of a cogent nature as against his assignees; but they were not estopped by these representations from showing that, in truth and in fact, the goods were those of the bankrupt. The sheriff is bound, at his peril, to seize the goods of the proper party. Suppose he had arrested the wrong person, he could not have been justified had the person arrested said he was the party against whom the writ issued. Thus, in *Coote* v. *Lighworth* (2), "Coote brought false imprisonment against Lighworth, who justified, for that he had a warrant to arrest J. David. He asked of Coote what was his name, who answered, that his name was J. David; *per*

(1) The report has "Benjamin."—J. G. P. (2) Moore, 457.

quod, he arrested him. The plaintiff demurred, and it was adjudged for the plaintiff; for the defendant ought at *his peril to have taken notice of the party;" and HALE, C. B., in *Thurbane's* case (1), expresses his opinion to the same effect: "If a wrong man be taken, though he affirm himself to be the person against whom the commission is awarded, yet, the Commissioners having no warrant to take him by their commission, his affirming himself to be the person will not excuse them in false imprisonment, as has been held upon the executing of a *capias*." In a case where the real party was taken, but by the wrong christian name, but which he stated at the time to be his proper name, it was held, that he could not maintain trespass: *Price* v. *Harwood* (2); but there, it appeared that he was known by one name as well as the other.

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(ALDERSON, B.: I was present during the trial of that case; and I think I remember Lord ELLENBOROUGH said, that he knew a case where one of two brothers had procured himself to be arrested for the other, and an action by him for false imprisonment failed.

PARKE, B.: The first part of Lord ELLENBOROUGH'S decision in that case was correct, and is according to what is laid down in Com. Dig., "Imprisonment," L. (2); but what followed is merely a *dictum*.)

There is no difference in principle between the seizure of the wrong goods or the arrest of the wrong party. The present question has, no doubt, never before been raised. This representation of the bankrupt does not fall within the rules, as laid down by the Court of Queen's Bench in *Pickard* v. *Sears* (3), and *Gregg* v. *Wells* (4). In the latter case, DENMAN, Ch. J. says, "A party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving." In those cases, the question was, whether or not the party standing by and allowing the sale of his property, *was not to be taken to have concurred in it. No doubt the principle expounded by Lord DENMAN, in those cases, is rather broadly laid down.

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(PARKE, B.: It would seem, that the negligence must be in the nature of a neglect of some duty cast upon the party who is guilty of it.

(1) Hard. 323.
(2) 3 Camp. 108.
(3) 45 R. R. 538 (6 Ad. & El. 469).
(4) 50 R. R. 347 (10 Ad. & El. 98).

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ALDERSON, B.: A person cannot be said to be culpable in not doing a particular thing, unless it is his duty to do it.)

There was no duty cast on the bankrupt to say whose goods these were. The case of *Coles* v. *The Bank of England* (1) was well considered; but it is difficult to see how it can be supported. This matter is not an estoppel, as several requisites to create an estoppel are wanting. If it is, it ought to have been pleaded.

(PARKE, B.: Where a matter ought to be pleaded, and is not, it is left at large. It is questionable whether it be necessary to reply matter *in pais* to a plea which contains no affirmative matter, and concludes to the country. His Lordship referred to *Doe* v. *Wellsman* (2); *Armstrong* v. *Norton* (3); *Magrath* v. *Hardy* (4); *Sanderson* v. *Colman* (5); *Doe* v. *Huddart* (6); *Doe* v. *Wright* (7); *Doe* v. *Oliver* (8).)

It would not form a good replication in substance, by way of estoppel; it is insufficient, in many respects, according to the rules laid down in Com. Dig., "Estoppel," and Co. Litt. 352 a. The statement of the bankrupt was ambiguous: he said they were the goods of Benjamin; but he did not state that they were solely his. An estoppel should be precise. This was a mere naked falsehood. If the bankrupt intended to assign his goods by his act, it would be an act of bankruptcy: *Hooper* v. *Smith* (9).

(PLATT, B.: He did not intend to do so; for it appears by the [*658] evidence, that he made the statement for the purpose *of saving the goods from seizure.)

The facts, as they were found by the jury, would not support a replication by way of estoppel. The language of PARKE, B., in delivering the judgment of this Court, in *Lyon* v. *Reed* (10), is very applicable to the present case. He there says, "The acts *in pais*, which bind parties by way of estoppel, are but few, and are pointed out by Lord Coke, in Co. Litt. 352 a. They are all acts which anciently really were, and, in contemplation of law, have always continued to be, acts of notoriety, not less formal and solemn than

(1) 10 Ad. & El. 437.
(2) 2 Ex. 368.
(3) 2 Ir. Rep. 96.
(4) 44 R. R. 861 (4 Bing. N. C. 782).
(5) 4 Man. & G. 209.
(6) 2 Cr. M. & R. 316.
(7) 50 R. R. 534 (10 Ad. & El. 763).
(8) 34 R. R. 358 (5 M. & R. 202).
(9) 1 W. Bl. 441.
(10) 67 R. R. 593 (13 M. & W. 309).

the execution of a deed, such as livery, entry, acceptance of an estate, and the like. Whether a party had or had not concurred in an act of this sort, was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed." (They also cited *Armani* v. *Castrique* (1), and *Collins* v. *Evans* (2).)

Knowles (*Hall* with him), in support of the rule:

According to the authority of *Pickard* v. *Sears* (3), and *Gregg* v. *Wells* (4), and the principles there laid down, the plaintiffs are estopped.

(PARKE, B.: One way to consider whether or not the facts here amount to a defence, is to see whether the facts, if embodied in a plea, would make a good plea by way of estoppel to an action brought by William Broadbent in his own name, and averring that the goods were his.)

The older cases which have been cited do not bear much upon the question. There may be a distinction between an arrest of a person and the seizure of goods, as the old action of trespass to the person included also a breach of the peace. The case of *Pickard* v. *Sears* is not so strong as the present, for here the falsehood was wilful and intentional, which was not so there. In the case last *cited, the plaintiff did not assert that the goods were his: he sanctioned the act by not interfering; and it was held, that he was bound by his conduct. [*659]

(PARKE, B.: In *Heane* v. *Rogers* (5), BAYLEY, J., says, "There is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence, and strong evidence, against him; but we think that he is at liberty to prove that such admissions were mistaken, or were untrue, and is not estopped or concluded by them, unless another party has been induced by them to alter his condition; in such a case, the party is estopped from disputing their truth, with respect to that person, (and those claiming under him,) and that transaction, but as to third parties, he is not bound;" and he afterwards proceeds to say, that, "It is not necessary to refer particularly to the cases in which a bankrupt has been precluded from disputing his commission, and

(1) 67 R. R. 665 (13 M. & W. 443).
(2) 64 R. R. 656 (5 Q. B. 820).
(3) 45 R. R. 538 (6 Ad. & El. 469).
(4) 50 R. R. 347 (10 Ad. & El. 90).
(5) 9 B. & C. 577, at pages 586 and 588.

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which were cited in argument. The earlier cases fall within the principle above laid down. In *Clarke* v. *Clarke* (1), the bankrupt was not permitted to call that sale a conversion, which he himself had procured and sanctioned. In *Like* v. *Howe* (2), he was precluded from testing the title of persons to be assignees, whom he, by his conduct, had procured to become so; and the last case on this subject, *Watson* v. *Wase* (3), is distinguishable from the present, because Wase, one of the defendants, was the person from whose suit the plaintiff had been discharged; and therefore, perhaps, he might be estopped with respect to that person, by his conduct towards him." In *Pickard* v. *Sears*, the Court had the case of *Heane* v. *Rogers* before them. I think you will find that the person who makes a statement, on which another alters his position, is not estopped, unless he so induces the latter to alter his position, [*660] that the former would be responsible *to him in an action for it. In the present case, the bankrupt makes one statement one moment, and another and a different one the next. There is no way of stating the facts, to show that the bankrupt authorised the act, or that there was such a deceitful representation, known by the bankrupt to be false, and made with the intent that the defendant should seize the goods, or so made as to cause the defendant, acting as a reasonable man, to seize the goods.)

In *The Sheffield, Ashton-under-Lyne, and Manchester Railway* v. *Woodcock* (4), PARKE, B., says, "It is a universal rule of law, that, where a party makes a representation to another, whereby the situation of the latter is altered, he is bound thereby." *Banks* v. *Newton* (5) is an authority to the same effect.

(ALDERSON, B.: Culpability includes will: negligence may, or may not; consequently, the language of Lord DENMAN, in *Gregg* v. *Wells* (6), must be understood with reference to such negligence as would imply will.)

Coles v. *The Bank of England* proceeded on the assumption, that the testatrix did not in fact know of the diminution of her stock, but was guilty of negligence in receiving without objection the dividends on the sums reduced. The principle there established is, that if a party negligently omits to contradict an assumed state of facts, when he might or ought to contradict them, he is concluded by it.

(1) 6 Esp. 61.
(2) 6 Esp. 20.
(3) 5 B. & C. 153.
(4) 56 R. R. 788 (7 M. & W. 574).
(5) 16 L. J. Q. B. 142.
(6) 50 R. R. 347 (10 Ad. & El. 90).

(PARKE, B.: You do not mean to argue, that, if a person makes a mis-statement, without any intention that another party should act upon it, and when he could not expect that another party would act upon it, that, in such case, he is bound? If the estoppel be carried to this extent, viz. where a party makes a representation, under such circumstances that a reasonable man might naturally infer that it was intended that he should act upon it, then this case does not fall within that principle. *In *Pickard* v. *Sears* (1), the COURT say, "The rule of law is clear, that, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded," &c. If the word "wilfully" be read as overruling both propositions, that is, no doubt, correct.)

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Here the seizure was under circumstances which would lead a reasonable man to believe the mis-statement, and act upon it. (He also cited *Wilson* v. *Stubs* (2).)

The judgment of the COURT was now delivered by

PARKE, B.:

In this case, which was argued before my brothers Alderson, Rolfe, Platt, and myself, at the sittings after the last Term, we are all of opinion that the rule ought to be discharged.

It was an action of trover, by the assignees of William Broadbent, against the Sheriff of Yorkshire, for goods of the bankrupt. There were pleas of Not guilty, not possessed, and leave and license. The conversion was the seizure of the goods by the defendant's officers, under a *fi. fa.* against Joseph and Benjamin Broadbent. It appeared, that, when the officers entered, the bankrupt told them the goods seized were the property of Benjamin; he did so, supposing that they had no writ against Benjamin. Afterwards he contradicted that statement, and said they were the goods of his brother Joseph. It was contended, that this representation bound William, because it induced the officers to seize; and that he could not complain of that act, nor could the assignees who claimed under him. My brother ALDERSON left a question to the jury upon this part of the case, the finding on which he reserved for the consideration of the Court, giving leave to enter a verdict *for the defendant on

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(1) 45 R. R. 538 (6 Ad. & El. 469). (2) Hob. 330.

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the issue on the plea of not possessed. The jury found, that the goods were really William's; but they also found, "that William represented the goods to the sheriff's officer as the goods of Benjamin, so as to induce him, by that false representation, to seize them;" and the question is, whether this finding is sufficient to estop the bankrupt and the plaintiffs as assignees, from complaining of the seizure of these goods as their own?

The case was very fully argued before us, and many questions discussed on the law of estoppels, on which it is unnecessary to give an opinion. It is certain that estoppels by record and by deed must, in order to make them binding, be pleaded, if there be an opportunity, otherwise the party omitting to plead it waives the estoppel, and leaves the cause at large, on which the jury may find according to the truth: *Trevithar* d. *Trevithar* v. *Lawrence* (1); *Magrath* v. *Hardy* (2). With respect to estoppels *in pais*, in certain cases there is no doubt they need not be pleaded in order to make them obligatory. For instance, where a man represents another as his agent, in order to procure a person to contract with him as such, and he does contract, the contract binds in the same manner as if he made it himself, and is his contract in point of law; and no form of pleading could leave such a matter at large, and enable the jury to treat it as no contract. The same rule appears to apply to all similar estoppels *in pais*, as the learned editor of Wms. Saund. (Vol. 1, p. 326, *n.* 2) expresses his opinion. The estoppel, therefore, if it be one created by the conduct of the bankrupt in this case, is not opened by the omission to plead it; and the only question is, whether it be an estoppel? It is contended that it was, upon
[*663] the authority of the rule laid down in *Pickard* v. *Sears* (3). That rule is, "that, where one, by his words or conduct, wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." That was founded on previous authorities, in the cases *Graves* v. *Key* (4), *Hearne* v. *Rogers* (5), and has been acted upon in some cases since. The principle is stated more broadly by Lord DENMAN, in the case of *Gregg* v. *Wells* (6), where his Lordship says, that a party who negligently or culpably stands by and allows another to contract on

(1) 2 Ld. Ray. 1051; Salk. 277.
(2) 44 R. R. 861 (4 Bing. N. C. 782).
(3) 45 R. R. 538 (6 Ad. & El. 474).
(4) 3 B. & Ad. 318, *n.*
(5) 9 B. & C. 586.
(6) 50 R. R. 347 (10 Ad. & El. 90).

the faith of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving. Whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been applied, is not now the question; but the proposition contained in the rule itself, as above laid down in the case of *Pickard* v. *Sears*, must be considered as established. By the term "wilfully," however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least, that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting *to inform his customers of the fact, in the usual [*664] mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorised. But if we apply this rule, either in the terms in which it is enunciated in *Pickard* v. *Sears*, or as it is above expounded, the finding of the jury is insufficient to entitle the defendant to have a verdict entered for him on the plea of not possessed. It is not found that he intended to induce the officer to seize the goods as those of Benjamin; and, whatever intention he had on his first statement, was done away with by an opposite statement before the seizure took place. Nor can it be said that any reasonable man would have seized the goods on the faith of the bankrupt's representation, taken altogether. In truth, in most cases to which the doctrine in *Pickard* v. *Sears* is to be applied, the representation is such as to amount to the contract or license of the party making it. Here there is no pretence for saying it amounted to a license, and a contract is out of the question. We therefore think that the rule must be discharged.

Rule discharged.

1848.
June 27.

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BOILEAU *v.* RUTLIN (1).

(2 Ex. 665—681; S. C. 12 Jur. 899.)

A bill in Chancery is not evidence of the truth of the facts stated in it, as against the party in whose name it is filed, even though his privity be shown, but is only admissible to prove that a suit was instituted, and the subject-matter of it.

Semble, that pleadings in equity as well as at common law are not to be treated as positive allegations of the truth of the facts therein, for all purposes, but only as statements of the case of the party, to be admitted or denied by the opposite side, and if denied, to be proved and ultimately submitted for judicial decision.

The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are conclusive evidence between them; so are the material facts alleged by one party which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though for the purposes of the cause he is bound by those that are material, ought not, it should seem, to be treated as confessions of the truth of the facts stated.

ASSUMPSIT for use and occupation. Plea, *non assumpsit*, except as to 90*l*., and payment of that sum into Court, with averment of no damages *ultra*. Replication, damages *ultra*; upon which issue was joined.

At the trial, before Lord Denman, Ch. J., at the Surrey Spring Assizes, 1847, it appeared that the action was brought to recover 223*l*. 2*s*. 6*d*. for the use and occupation of a dwelling-house for four years and a quarter, ending at Christmas, 1846. The house in question was one of many others, called the Castlenau Villas, in the Hammersmith Bridge Road, which had been built by the plaintiff on land demised to him for a term of years by a building lease from the freeholder. This lease contained certain covenants on the part of the lessee, applicable to all the houses, and for a breach of which as to any one house, the lessor became entitled to re-enter upon the whole. The defendant was let into possession under an agreement to purchase the plaintiff's interest in the house in question for 630*l*., subject to the covenants in the building lease; but he refused to complete the purchase, on the ground that the title was not marketable, by reason of the above-mentioned right of re-entry. The plaintiff thereupon filed a bill in Chancery, praying a specific performance of the agreement, and the defendant having put in an answer, the suit was heard and a decree made, that the bill be dismissed with costs. In order to prove the agreement to purchase, the defendant, who had given notice to produce it, did not call for

(1) See *Lyell* v. *Kennedy* (1889) 14 App. Cas. 437, 450, 59 L. J. Q. B. 268.—J. G. P.

it, but tendered in evidence the bill in equity, which set out the agreement *verbatim*. It was objected, that the *statements in the bill were inadmissible in evidence against the plaintiff; but the learned Judge received the bill as some evidence, and the jury having found that the amount paid into Court was a sufficient compensation for the occupation, from the time the suit terminated until Christmas, 1846, his Lordship directed a verdict for the defendant, reserving leave for the plaintiff to move to enter a verdict for him in respect of the previous occupation, if the Court should be of opinion that the bill in equity was inadmissible (1).

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A rule *nisi* having been obtained accordingly,

Lush showed cause (2):

The question is, whether statements in a bill in Chancery, upon which the plaintiff founds his claim to relief, are evidence against him in an action between the same parties? A parol admission by the plaintiff, that the agreement set out in the bill had in fact been made, would, no doubt, have been receivable in evidence: *Slatterie* v. *Pooley* (3); *Howard* v. *Smith* (4); and it is difficult to see why the same statement, made in proceedings in Court, should not be equally admissible.

(PARKE, B.: Under the old system of pleading, a declaration might contain twenty different statements of the same cause of action. Do you contend that every count would be evidence against the plaintiff of so many different contracts?)

The question is not as to the effect of the evidence, but whether the plaintiff's declaration can be altogether excluded. [He cited Buller's Nisi Prius, pp. 235, 236, Greenleaf on Evidence (5), *Woollett* v. *Roberts* (6), *Lord Ferrers* v. *Shirley* (7), and *Doe* d. *Bowerman* v. *Sybourn* (8).] In *Warwick* v. *Foulkes* (9), which was an action for false imprisonment, the defendant pleaded the general issue and a justification, but his counsel at the trial abandoned the justification; and it was held, that the putting such a plea on the records was a

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(1) It was also objected, that the decree was not properly proved; but the judgment of the COURT renders it unnecessary to notice the argument on that point.

(2) The case was argued in Hilary Term, 1848, on the 22nd and 29th of January, and at the sittings in Banc after that Term, on the 5th of February.

(3) 55 R. R. 760 (6 M. & W. 664).

(4) 60 R. R. 506 (3 Scott, N. R. 574).

(5) Sect. 212, p. 246.

(6) Ch. Ca. 64.

(7) Fitz. 195, 7th ed.

(8) 4 R. R. 363 (7 T. R. 2).

(9) 12 M. & W. 507.

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circumstance which the jury might take into their consideration in the estimation of damages.

(PARKE, B.: That was a statement on the record in the same action.)

It has never been doubted that an answer in Chancery is receivable in evidence against the party making it.

(ALDERSON, B.: That is because the party on oath affirms it to be true.)

Upon the same principle, the bill would be evidence if it appeared by any mode that the plaintiff admitted the statements contained in it. When his privity is shown, the bill becomes primary evidence.

(PARKE, B.: No doubt the bill, if admissible at all, would be primary evidence.)

[671] * * If the plaintiff had sued on this agreement, and after plea had obtained a verdict and judgment, the record would have been conclusive evidence; and if so, it can make no difference that the proceedings are in another Court. While the statements of a party, or his admission of a letter written by another, are receivable in evidence against him, upon what principle is a deliberate statement made in a court of equity, for the purpose of relief, to be excluded?

(PARKE, B.: The answers of the Judges, in *The Banbury Peerage* case (1), are expressly in point.)

There the plaintiff proposed to read in evidence a bill in equity, filed by one of his ancestors, and it was substantially the same as if he had sought to make his own bill evidence in his own favour. It is true that one of the questions put to the Judges is, "whether any bill in Chancery can ever be received as evidence in a court of law, to prove any facts either alleged or denied in such bill?" But that must be understood to mean, can it be evidence on behalf of the person by whom it is filed? [He also cited *Goss* v. *Quinton* (2), *Fishmongers' Company* v. *Robertson* (3), *Brickell* v. *Hulse* (4), *Cole* v. *Hadley* (5), and *Gardner* v. *Moult* (6).]

(1) 2 Sel. N. P. 756, 10th ed.
(2) 4 Scott, N. R. 471.
(3) 63 R. R. 242 (5 Man. & G. 131).
(4) 45 R. R. 750 (7 Ad. & El. 454).
(5) 52 R. R. 517 (11 Ad. & El. 807).
(6) 50 R. R. 480 (10 Ad. & El. 464).

Shee, Serjt., and *Peacock*, in support of the rule: BOILEAU v. RUTLIN.

A bill in equity is only evidence that a suit was depending between the parties, in which certain matters were in dispute, and not evidence of the facts stated in the bill: *Lord Ferrers* v. *Shirley* (1), *Doe* d. *Bowerman* v. *Sybourn* (2), *Banbury Peerage* case (3). The same principle applies to a bill in equity as to proceedings at common law. A declaration is not evidence against the plaintiff of the facts therein stated, nor is a plea evidence against the defendant; but those pleadings are simply evidence to show the existence of a suit, and what was in issue between the *parties. In the ordinary case [*672] of an action for goods sold and delivered, with pleas of the general issue and payment, could the latter plea be taken as an admission that the goods were in fact sold? Suppose a plaintiff declared on a contract to pay 20*l.*, and at a future day deliver a horse, and assigned but one breach for non-payment of the money (the time for the delivery of the horse not having then arrived), to which the defendant pleaded payment, and obtained a verdict, if the plaintiff afterwards sued in respect of the non-delivery of the horse, and the defendant pleaded *non assumpsit* to that action, could the pleadings in the first action be given in evidence against the defendant as an admission of the contract? Or suppose a declaration containing two counts, the one on a contract by the defendant to pay 100*l.* two months after date, the other alleging, that, in consideration that the plaintiff would release the defendant from the first contract, he promised to pay the plaintiff 100*l.*; if the defendant should plead to the first count a release, and to the second *non assumpsit*, could the first plea be used as an admission of the second contract? If the statements in pleadings are equivalent to admissions in the presence of witnesses, they must be so for all purposes; and even if a plea were amended, the original plea would nevertheless be evidence against the defendant. But it is clear that admissions in one plea are no proof of the allegations contained in another: *Edmunds* v. *Groves* (4); *Smith* v. *Martin* (5); and if not evidence in the same cause, how can they be so in a different action? * * In *Medcalfe* v. *Medcalfe* (6), [674] Lord HARDWICKE said, "At law the rule of evidence is, that a bill in Chancery ought not to be received in evidence, for it is taken to be the suggestions of counsel only; but in this Court it has been often allowed." There, however, the bill was read in the very same suit.

(1) Fitz. 196.
(2) 7 T. R. 2.
(3) 2 Sel. N. P. 756, 10th ed.
(4) 2 M. & W. 642.
(5) 1 Dowl. (N. S.) 418.
(6) 1 Atk. 63.

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(ALDERSON, B.: It might have been read for the purpose of limiting the proof, by showing that certain evidence was inadmissible, because the party had not made a particular statement in his bill.)

In *Kilbee* v. *Sneyd* (1), Lord Chancellor HART refused to allow a bill to be read as evidence, saying, "The Court never reads a bill as evidence of the plaintiff's knowledge of a fact. It is mere pleader's matter. The statements of a bill are no more than the flourishes of a draughtsman." *Slatterie* v. *Pooley* (2), and *Howard* v. *Smith* (3), are cases in which the declarations of a party to a suit, in respect of a written document, were held to be evidence against him. But an admission by the defendant in an answer in Chancery, is merely secondary evidence of the execution of a deed, and therefore does not supersede the necessity of proving it by the subscribing witness: [*675] *Call* v. *Dunning* (4); 2 Stark. Evid. 25. In *Snow* *d. *Lord Crawley* v. *Phillips* (5) the answer and other proceedings in the suit were admitted in evidence, as showing the privity of the party in whose name the bill was filed. In *Roe* d. *Lord Trimblestown* v. *Kemmis* (6) the bill was produced by the defendant for the purpose of showing the subject-matter of the suit, and that certain matters were in issue between the parties. In *Brickell* v. *Hulse* (7) the party had used the affidavit as a true statement, and therefore it was admitted as evidence against him. The Court there advert to the distinction between affidavits so used and depositions made in a suit in equity.

(PARKE, B.: The marginal note to that case is not quite correct (8). If a person uses an affidavit containing a hundred different statements, they cannot all be evidence against him.

ALDERSON, B.: The decision itself is quite correct; and the marginal note should have been, "Where a sheriff, in a case of interpleader before a Judge, puts in an affidavit of his officer, that the latter seized the goods, that is evidence as against a sheriff, that the officer did so seize.")

In *Gardner* v. *Moult* (9) the creditor sent his servant to prove a particular act of bankruptcy, and so made the deposition evidence against him of such act of bankruptcy. In *Cole* v. *Hadley* (10) it does not clearly appear upon what ground the evidence was held

(1) 2 Molloy, 208.
(2) 55 R. R. 760 (6 M. & W. 664).
(3) 60 R. R. 506 (3 Scott, N. R. 574).
(4) 4 East, 53.
(5) 1 Sid. 220.
(6) 57 R. R. 135 (9 Cl. & Fin. 749).
(7) 45 R. R. 750 (7 Ad. & El. 454).
(8) See 2 Nev. & P. 426.
(9) 50 R. R. 480 (10 Ad. & El. 464).
(10) 52 R. R. 517 (11 Ad. & El. 807).

admissible. It may have been that the witness was the plaintiff's agent, sent to lay the information. BOILEAU v. RUTLIN.

Cur. adv. vult.

The judgment of the COURT was now delivered by

PARKE, B.:

This case was argued before my brothers Alderson, Rolfe, and Platt, and myself, on two days in the course of the sittings in and after Hilary Term, on showing cause *against a rule *nisi* to enter a [*676] verdict for the plaintiff, pursuant to leave reserved by Lord DENMAN. The action was for the use and occupation of the plaintiff's house for four years and a quarter, ending at Christmas, 1846. The defendant's answer was, that he had been let into possession on an agreement to purchase the plaintiff's leasehold interest for 680*l.*, and continued in such possession for some time. The defendant paid into Court a sum sufficient to cover the compensation for the occupation from the end of that time till Christmas; and the question was, whether he was bound to pay the remainder. In order to discharge himself from the rent for this period, it was necessary for him to prove that there was an agreement to purchase, under which he entered. He had given notice to produce the agreement; and, though the plaintiff offered to produce it, he did not call for it, but he put in, as evidence of the agreement, the plaintiff's bill in Chancery, which had been filed to compel the defendant to perform it, and which of course stated the terms of it. The defendant had answered, and the cause had proceeded to a hearing. It was objected, that the statements in the bill were inadmissible as evidence against the plaintiff. Lord DENMAN received the bill as some evidence of the contract, reserving the point; and the question in the case is, whether the bill ought to have been received for that purpose. It was not doubted that, if it was to be received, it was primary evidence, on the principle of the case of *Slatterie* v. *Pooley* (1).

It is certain that a bill in Chancery is no evidence against the party in whose name it is filed, unless his privity to it is shown. That was decided in *Woollett* v. *Roberts* (2), though no such decision was wanted. The proceedings on such a bill, after answer, tend to diminish the presumption that it might have been filed by a stranger, and appear to have been held sufficient to establish the

(1) 55 R. R. 760 (6 M. & W. 664). (2) 1 Ch. Ca. 64.

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*privity of the party in whose name it was filed: *Snow* d. *Lord Crawley* v. *Phillips* (1). When that privity is established, there is no doubt that the bill is admissible to show the fact that such a suit was instituted, and what the subject of it was; but the question is, whether the statements in it are any evidence against the plaintiff of their truth, on the footing of an admission. Upon this point the authorities are conflicting.

In the case referred to in Siderfin, it would seem that the bill, which was filed by the defendant to be relieved from a bond as simoniacal, was used against him to prove that he was simoniacally presented; but it does not very distinctly so appear.

In Buller's Nisi Prius (2) a bill in Chancery is said to be "evidence against the complainant, for the allegations of every man's bill shall be supposed to be true; and therefore, it amounts to a confession and admission of the truth of any fact; and if the counsel have mingled in it any fact that is not true, the party may have his action." And, after referring to the conflicting authority in Fitzgibbon, 196, the author of that Treatise on the Law of Nisi Prius (3) lays it down as a clear proposition, that where the matter is stated by the bill as a fact on which the plaintiff founds his claim for relief, it will be admitted in evidence, and will amount to proof of a confession.

These are the authorities in favour of the defendant. The recent case of *Lord Trimlestown* v. *Kemmis* (4), which was also mentioned, is not one in his favour, for the bill was there admitted to show what the subject of the suit was, and to explain a subsequent agreement for a settlement between the parties.

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On the other hand, in the above-mentioned case of *Lord *Ferrers* v. *Shirley* (5), a bill preferred by the defendant, stating the existence of a deed at that time, was objected to as proof of that fact, on the ground that it was no more than the surmise of counsel for the better discovery of the title; and the Court would not suffer it to be read. And Lord KENYON, in *Doe* d. *Bowerman* v. *Sybourn* (6), where the distinction was insisted upon between facts stated by way of inducement, and those whereon the plaintiff founds his claim for relief, rejected that distinction, and pronounced his judgment, in which the COURT acquiesced, that a bill in Chancery

(1) 1 Sid. 220.

(2) P. 236.

(3) In the course of the argument PARKE, B., stated, that the Treatise was written by Lord Bathurst, though published in the name of Mr. Justice Buller.

(4) 57 R. R. 135 (9 Cl. & Fin. 749).

(5) Fitz. 195.

(6) 7 T. R. 2.

is never admitted farther than to show that such a bill did exist, and that certain facts were in issue between the parties, in order to let in the answer or depositions. And it appears that in *Taylor* v. *Cole* (1) his Lordship held the same doctrine; with the exception, that a bill in Chancery by an ancestor was evidence to prove a family pedigree stated therein, in the same manner as an inscription on a tombstone, or an entry in a Bible.

This exception also was disallowed by the opinion of the Judges in *The Banbury Peerage* case, (reported in 2 Selwyn's Nisi Prius, 756, 10th ed., and correctly reported, for I have examined the books of the Committee of Privileges, 28th February and 30th May, 1809). The Judges unanimously held, that a bill in equity was no proof of the facts thereon alleged, or as a declaration respecting pedigree; that it made no distinction that the bill was filed for relief. And, in answer to the question, whether any bill in Chancery can ever be received as evidence in a court of law, to prove any facts either alleged or denied in such bill, the Judges gave their opinion, that, generally speaking, a bill in Chancery cannot be received as evidence to prove any fact alleged or denied in such bill. But, whether any possible case might be put which would form an exception *to such general rule, the Judges could not undertake to say. In the case of *Medcalfe* v. *Medcalfe* (2), Lord Chancellor HARDWICKE held, that the rule of evidence at law was, that a bill in Chancery ought not to be received in evidence, for it is taken to be the suggestion of counsel only; but in the Court of Chancery it had been often allowed, and the bill was read. This distinction was afterwards repudiated in the case of *Kilbee* v. *Sneyd* (3) by Lord Chancellor HART. When the defendant's counsel offered to read part of the bill, as proof of certain facts on which he rested part of his defence, the LORD CHANCELLOR said, the Court never read a bill as evidence of the plaintiff's knowledge of a fact: "It is mere pleader's matter; the statements of a bill are no more than the flourishes of the draughtsman;" and that no decree was ever founded on the allegations of a plaintiff's bill, as evidence of facts; and he further said, that the statements of a bill are not evidence, and the Registrar could not enter any part of it on his notes as read.

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In this state of the authorities directly bearing upon this question, there can be no doubt that the weight of them is against the reception of a bill in equity as an admission of the truth of any of

(1) 7 T. R. 9, *n.*
(2) 1 Atk. 63.
(3) 2 Molloy, 208.

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the alleged facts. But it was argued, that there are many more recent authorities indirectly bearing upon this question, which afford a strong analogy in favour of the reception of a bill in equity as evidence in the nature of a confession. These are the cases of *Brickell* v. *Hulse* (1) and *Gardner* v. *Moult* (2). In the first of these, a party using an affidavit on a motion, in the second, by sending another to state a particular fact, was held to make the affidavit and statement respectively evidence against himself. These cases do not fall under the description of pleadings by parties; they are

[*680] *rather instances of admission by conduct, and are analogous to those in which the declarations of third persons are made evidence by the express reference of the party to them as being true. This is the explanation very rightly given in Mr. Taylor's recent Treatise on Evidence. In the first of the above-mentioned cases it may be presumed that the defendant prepared the affidavit, which he afterwards exhibited as true; at all events, that he exhibited it for the purpose of proving a certain fact. In the second, it must be taken that he sent the servant to prove a particular act of bankruptcy; for, if he sent him to be examined as a witness, and to give evidence generally as to any act to which the Commissioner might examine him, there could be no reason for holding that his answers would be evidence against the party, any more than there would be for receiving the evidence of a witness examined by a party in an ordinary trial at law, as an implied admission by him, which, it is conceded, can never be done. (See Lord DENMAN'S judgment in both the cases last cited.) The case of *Cole* v. *Hadley* (3) was also referred to as an authority. From the short report of that case, it is not clear on what ground the evidence was received. It would seem that it was received as the deposition of a witness on a prior inquiry, between the same parties, on the same question. It could not be on the ground that the statement was evidence against the party, simply because the witness was produced by him, as the contrary was laid down in the two cases of *Brickell* v. *Hulse* and *Gardner* v. *Moult*, which were referred to. These authorities, therefore, afford no reason for doubting the propriety of the decisions above referred to as to bills in equity. It would seem that those, as well as pleadings at common law, are not to be treated as positive allegations of the truth of the facts therein, for

[*681] all purposes, but only as statements of the *case of the party, to be

(1) 45 R. R. 750 (7 Ad. & El. 454).
(2) 50 R. R. 480 (10 Ad. & El. 464).
(3) 52 R. R. 517 (11 Ad. & El. 807).

admitted or denied by the opposite side, and if denied to be proved, and ultimately submitted for judicial decision.

The facts actually decided by an issue in any suit cannot be again litigated between the same parties, and are evidence between them, and that conclusive, upon a different principle, and for the purpose of terminating litigation; and so are the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, but only if the traverse is found against the party making it. But the statements of a party in a declaration or plea, though, for the purposes of the cause, he is bound by those that are material, and the evidence must be confined to them upon an issue, ought not, it should seem, to be treated as confessions of the truth of the facts stated.

Many cases were suggested in the argument before us, of the inconveniences and absurdities which would follow from their admission as evidence in other suits, of the truth of the facts stated. There is, however, we believe, no direct authority on this point. The *dictum* of Lord Chief Justice TINDAL, in *The Fishmongers' Company* v. *Robinson* (1), which was referred to in argument, seems to be considered as amounting to a decision on this point; but it was unnecessary for the determination of that case. It is enough, however, to say, that, as to bills of equity, the weight of authority is clearly against their admissibility, for the only purpose for which they were material in the present case; and we are bound by that authority.

It becomes unnecessary to consider the other point argued before us. The rule must be absolute to enter a verdict for the larger sum, as the defendant cannot be allowed anything for repairs.

Rule absolute.

VAN CASTEEL AND OTHERS *v.* BOOKER AND OTHERS (2).

1848.
June 27.
July 11.

(2 Ex. 691—710; S. C. 18 L. J. Ex. 9.)

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L., S. & Co., the correspondents at Rio of B. & Co., merchants at Liverpool, purchased a quantity of coffee, on their own credit principally, but in part with funds supplied by B. & Co. For the amount of the purchase on their credit, L., S. & Co. drew bills on B. & Co., and the coffee they shipped on board a vessel of B. & Co., bound for "Cork and a market." An invoice was made out, stating the coffee to be shipped by order and on account and risk of B. & Co.; but L., S. & Co. procured the captain to sign bills of lading, making the coffee deliverable to their order or assigns,

(1) 63 R. R. 242 (5 Man. & G. 192).
(2) Sale of Goods Act, 1893, s. 19 (1), and authorities there cited by Mr. Chalmers.—F. P.

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"freight free." One of these bills they indorsed in blank, and transmitted by post to B. & Co. on the 21st of September. At the end of September, A. W., the agent in England of L., S. & Co., asked the principal partner in the firm of B. & Co. to cause the bill of lading to be placed in third hands, to secure the bills drawn on account of the purchase, to which he agreed, and on the 16th of October gave a written order to that effect. On the 12th of November, which was after B. & Co. had committed an act of bankruptcy, the bill of lading arrived, and was, in pursuance of the above-mentioned agreement, delivered to A. W. for the above-mentioned purpose, who, after the *fiat*, pledged it for a large advance with the plaintiffs, merchants at Rotterdam. The cargo having afterwards arrived, the assignees got possession of it, and trover was brought by the plaintiffs, as indorsees of the bill of lading: Held, that though the contract was *primâ facie* made on behalf of the vendors, it was a question for the jury, looking at the form of the bill of lading and language of the invoice, &c., whether the goods were not really delivered on board, to be carried for and on account and at the risk of the bankrupts; and if they were, the right of stoppage *in transitu*, and also the power of rescinding by the bankrupts, so as to defeat the rights of their creditors, were both at an end; but if the jury should think, from the form of the bill of lading, that it was intended to preserve the rights of the unpaid vendors until some further act was done, by transferring the bill of lading, the right to stop the goods *in transitu*, and also the power of rescinding, would continue until the bill of lading, indorsed, reached the hands of the bankrupts; in which latter case it was competent for them to give the unpaid vendors a lien on the whole for the part not paid (1).

TROVER for coffee. Pleas, Not guilty, and not possessed.

At the trial, before Rolfe, B., at the Liverpool Spring Assizes, 1848, it appeared that the defendants were the assignees of Barton, Irlam, and Higginson, of Liverpool, who had become bankrupt, and that the plaintiffs, who were merchants at Rotterdam, claimed the coffee in question, which was the cargo of the ship *Vigilant*, as indorsees for value of the bill of lading, from A. W. Lyon, of Liverpool. A. W. Lyon traded as a commission merchant; he was correspondent of and agent for the house of Lyon, Schwind & Co., at Rio de Janeiro, and was a partner in that house. In the month
[*692] of September, 1847, Barton, Irlam, and *Higginson sent two vessels, the *Alice* and the *Vigilant*, of which they were owners, to Rio de Janeiro for cargoes to be shipped by Lyon, Schwind & Co., on account of Barton, Irlam, and Higginson. The *Vigilant* was laden with coals belonging to Barton, Irlam, and Higginson, and consigned to Lyon, Schwind & Co., who advanced the disbursements for the ship, sold the coals, and received the price. Partly with this money, but principally on their own credit, they procured 5,090 bags of coffee, which they shipped on board the *Vigilant*, and took

(1) As to the other points decided see note (1), p. 739; and note (1), p. 742, *post*.—J. G. P.

from the master bills of lading dated the 21st September, 1847, at Rio de Janeiro, for 5,090 bags of coffee, shipped by Lyon, Schwind & Co. of Janeiro, on board the *Vigilant*, bound "for Cork and a market," deliverable "to order or assigns, he or they paying freight free." The word "free" was in writing—the words "he or they paying freight," were in a printed form. An invoice was made out, stating the coffee to have been shipped by Lyon, Schwind & Co., of Rio, on board the *Vigilant*, bound for Cork and a market, "by order and for the account and risk of Barton, Irlam, and Higginson." On the back of this invoice, Lyon, Schwind & Co. made out an account current between themselves and Barton, Irlam, and Higginson, in which they took credit for the amount of the disbursements for the ship, and the invoice price of the coffee, and debited themselves with the proceeds of the coals, and the amount of two bills drawn for the balance upon Barton, Irlam, and Higginson. One of these drafts was payable to the order of A. W. Lyon, the other to the order of Carruthers & Co.; and both were expressed to be "for value in account, which place to the account of coffee, per *Vigilant*, as advised by Lyon, Schwind & Co." Lyon, Schwind & Co. indorsed one part of the bill of lading in blank, and on the 24th September sent it so indorsed, together with the invoice and account current, by post, in a letter addressed to Barton, Irlam, and Higginson.

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The principal partner in the firm of Barton, Irlam, and Higginson was Jonathan Higginson, who resided at Liverpool, and managed the business of the house there. The firm, which had been established many years, and had traded to an immense extent, from time to time obtained advances from their bankers, the Royal Bank of Liverpool. In the beginning of the year 1847, the balance due to the Royal Bank amounted to nearly half a million; and the manager and directors becoming alarmed, pressed J. Higginson for security, or that he should reduce the balance. Some angry discussions having in consequence taken place, on the 23rd of September the directors of the Royal Bank passed a formal resolution, that, unless the balance then due to the Bank, amounting to 460,000*l.* and upwards, was secured or paid, proceedings should be taken against the sureties of Messrs. Barton, Irlam, and Higginson; and they forwarded a copy of this resolution to J. Higginson.

The resolution was intended to be strictly secret, but by a private channel it became known to A. W. Lyon about the end of September. He in consequence sent to the office of J. Higginson

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a note, of which no copy was kept, and which could not be found amongst the bankrupt's papers. J. Higginson, who was at that time absent from Liverpool, wrote in answer, requesting A. W. Lyon to visit him at his shooting lodge, at Huyton. On the 7th of October A. W. Lyon went there, and one Parsons, the managing clerk of Barton, Irlam, and Higginson was also there. On the 8th, some conversation took place between J. Higginson and A. W. Lyon, in the presence of Parsons, the nature and effect of which was the chief disputed fact at the trial. The plaintiffs' case was, that this conversation amounted to a demand, on the part of A. W. Lyon, that the bills of lading of the expected cargoes of the *Alice* and *Vigilant* should on their arrival be placed in the hands of a third party, as a security for the bills expected to be, and which, [*694] *as above stated, were in fact drawn against those cargoes, and a promise by Higginson that this should be done. The defendants maintained that it was no more than some vague statements on the part of J. Higginson; that A. W. Lyon need not be uneasy about the drafts, as he would take care that the proceeds of the cargoes were applied to honouring them. Nothing was done at the time, and A. W. Lyon returned to Liverpool on the 10th. On the 16th of October J. Higginson arrived in Liverpool, and on his arrival received a letter from the directors of the Royal Bank, in plain terms telling him, that, unless he secured the debt due to them, the firm should be made bankrupt. J. Higginson on the same morning caused his clerk to draw out a letter addressed to Mr. Haynes Higginson, his brother, (who was not concerned in the house of Barton, Irlam, and Higginson,) in the following terms:

"LIVERPOOL, October 16, 1847.

"DEAR SIR,—According to arrangement with Mr. A. W. Lyon, we request that you will hold to his order the bills of lading that have to come forward for the cargoes per *Alice* and *Vigilant*, (which vessels will be laden on our account by Messrs. Lyon, Schwind & Co., of Rio,) until the drafts drawn and to be drawn against said cargoes are paid.

"We remain, dear Sir,

"Your most obedient servants,

"BARTON, IRLAM, AND HIGGINSON."

J. Higginson signed this letter in the name of the firm, sent for A. W. Lyon and Haynes Higginson, and in the presence of the former handed the letter to Haynes Higginson. At the same time,

he handed a similar letter to Haynes Higginson, relating to some other cargoes in favour of another house; and he also gave A. W. Lyon the bills of lading of some other cargoes as security for bills of exchange which had been drawn by another correspondent, *and were then running. These transactions, if valid, disposed of all the available property of Barton, Irlam, and Higginson. [*695]

On the 21st of October the partners in that firm were served with an affidavit of debt, on the part of the Royal Bank, under the 1 & 2 Vict. c. 110, and on the 13th of November a *fiat* issued against the firm, which owed upwards of 900,000*l.*, and had no assets except the equity of redemption of some mortgaged estates, and the property disposed of on the 16th of October.

On the 12th of November, being the day after the act of bankruptcy was complete, the above-mentioned letter from Lyon, Schwind & Co., to Barton, Irlam, and Higginson, containing the bill of lading indorsed in blank, the invoice, and account current, arrived by post. The bill of lading was on the same day handed to A. W. Lyon, by Haynes Higginson. A clerk was sent on the same day to Cork, with instructions from Barton, Irlam, and Higginson, and also from A. W. Lyon, to order the *Vigilant* to Rotterdam. A. W. Lyon then entered into an arrangement with the plaintiffs, by which he was to consign the coffee to them at Rotterdam, and they were to make him advances on the consignments. He indorsed the bill of lading by writing his own name under the indorsement of Lyon Schwind & Co., and on the 16th of November forwarded it to the plaintiffs, and received about 5,000*l.* in advance upon it. This was, on the plaintiffs' part, a perfectly fair transaction, and entered into by them without the slightest knowledge of the circumstances under which the bill of lading came to the hands of A. W. Lyon. The drafts having become due, A. W. Lyon paid part of them, for the honour of the drawers.

The *Vigilant* sailed on the 27th of September. She was prevented by stress of weather from going to Cork for orders, and on the 30th of November put into Liverpool. The captain, who was ignorant of the bankruptcy of Barton, *Irlam, and Higginson, went [*696] on shore to report his arrival at their counting-house, and found it closed. On his return he found a messenger in possession of the ship and cargo, and was immediately after served with two notices, one from the plaintiffs, claiming the cargo as indorsees of the bill of lading, and another from A. W. Lyon, claiming to stop the goods *in transitu*, on behalf of Lyon, Schwind & Co., as unpaid vendors.

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On the part of the plaintiffs it was contended, first, that A. W. Lyon had a right to stop the goods *in transitu*; secondly, that the delivery of the letter of the 16th of October, 1847, was not a fraudulent preference, but merely the fulfilment of a binding agreement made at the time of the above-mentioned conversation between J. Higginson and A. W. Lyon at Huyton; thirdly, that, under the Factors Acts, A. W. Lyon had a right to pledge the bill of lading for the advances made upon it. The defendants' counsel contended, that the delivery of the letter was a voluntary act done for the purpose of favouring A. W. Lyon, or rather, to prevent the Royal Bank from gaining any advantage from their making the firm of Barton, Irlam, and Higginson bankrupt. They also argued, that, at all events, the plaintiffs could not maintain trover, as the agreement merely gave Lyon a personal lien until the drafts were paid, and conferred no authority to pledge the bill of lading.

The learned Judge told the jury that there could be no right to stop the goods *in transitu*, because the delivery on board the consignees' own ship amounted to a taking possession, and if not, the seizure by the messenger did; that the Factors Act did not apply, as Lyon was not a person intrusted with the bill of lading as factor or agent, but held it in his own right; that the plaintiffs' title depended upon whether or no the delivery of the letter of the 16th of October was a fraudulent preference; and that, in point of law, it was a fraudulent preference, unless the bankrupt J. Higginson
[*697] was actuated by fear, that, unless *he delivered it, he would be subject to proceedings. The jury having found for the defendants,

The *Attorney-General* (April 20) moved for a new trial, on the ground of misdirection:

First: the learned Judge was wrong in telling the jury that there was no right of stoppage *in transitu*. Although the coffee was shipped on board the vessel of Barton, Irlam, and Higginson, yet the consignors, Lyon, Schwind & Co., had received bills of lading making the coffee deliverable "to order or assigns;" Barton, Irlam, and Higginson, for the purpose of this transaction, were mere carriers, and the *transitus* would continue until the goods arrived at their destination under the bill of lading, viz. "Cork and a market."

(PARKE, B.: In the recent case of *Wait* v. *Baker* (1), where goods

(1) *Supra*, p. 469 (2 Ex. 1).

were shipped under a bill of lading, making them deliverable to the consignor's order, we thought that the property did not vest until the indorsed bill of lading was accepted by the consignee. Now in this case, if the property did not vest in Barton, Irlam, and Higginson, would they not have a right to repudiate the contract?)

They might; and such repudiation would be good as against the assignees, even though voluntary and in contemplation of bankruptcy: *Atkin* v. *Barwick* (1), *Dixon* v. *Baldwen* (2). Secondly: the ruling of the learned Judge, upon the question of fraudulent preference, conflicts with many decided cases. * * *

A rule *nisi* having been granted, [698]

Martin, *Crompton*, and *Corrie*, showed cause (June 27): [699]

First, it has been suggested that the case falls within the authority of *Atkin* v. *Barwick* (1), and *Dixon* v. *Baldwen* (2), and that the bankrupts had a right to repudiate the contract and return the goods. Those cases, however, only show that an insolvent purchaser may, before delivery, rescind the contract *in toto*; but he cannot, as here, take to the property and make a new contract in respect of it. This transaction with Lyon could have no effect except by way of a new contract. Lyon, Schwind & Co., bought at Rio, as the agents of Barton, Irlam, and Higginson, and partly with their money, certain goods which were shipped on board their ships sent for that purpose, and the invoice stated that the goods were shipped by their order, and on their account, and at their risk. It is difficult to imagine a more complete delivery.

(PARKE, B.: A delivery on board a purchaser's ship is in general a delivery to him; but according to the decision of this Court, in *Wait* v. *Baker* (3), where goods are shipped under a bill of lading making them deliverable to the shipper's own order, the property does not vest in the consignee until the bill of lading has been delivered to and accepted by him.)

The fact of the consignors indorsing the bill of lading in blank and sending it to the bankrupts, shows that the former never intended to take any precaution against the property vesting in the latter.

(PARKE, B., referred to *Mitchel* v. *Ede* (4).)

(1) 1 Str. 165.
(2) 7 R. R. 681 (5 East, 175).
(3) *Supra*, p. 469 (2 Ex. 1).
(4) 52 R. R. 525 (11 Ad. & El. 888

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The general rule is, that if goods are shipped on board a chartered vessel, the property vests in the consignee, subject to the right of stoppage *in transitu;* but if the goods are placed on board the purchaser's own ship, that is an absolute delivery—the same as if placed in his cart. The shipper may, however, protect himself by taking a bill of lading, making the goods deliverable to his own [*700] *order only; but in that case the property would pass as soon as he indorsed the bill of lading generally. Here no precaution was taken to prevent the *transitus* of the property: the goods were delivered under a bill of lading, in terms enabling the party to negotiate it.

(PARKE, B.: After the bill of lading was forwarded, but before it arrived, was it not competent for the vendees to rescind the contract, and deliver up the goods to the agent of the vendors?)

Though they might altogether rescind the contract, they could not, as here, take the property and give a security upon it. The letter of the 16th October is no rescission of the contract, but an agreement that Lyon should have a lien on the cargoes until the drafts were paid. If the goods should fetch more than the amount of the drafts, Barton, Irlam, and Higginson were to have the surplus; if the goods produced less, Lyon would have a claim against Barton, Irlam, and Higginson for the deficiency. Instead of rescinding the contract, the parties affirm it, and make it the basis of a new contract. *Smith* v. *Field* (1) is a distinct authority, that to bring a transaction within *Atkin* v. *Barwick* (2) there must be a complete rescission of the contract. * * *

[701] (PARKE, B.: In *Smith* v. *Field* there was an offer to rescind the contract, which offer the insolvent at the time had a right to make, but which was not accepted; therefore the contract was not rescinded, and the goods passed to the assignees. In this case it is important to consider whether Lyon could have stopped the goods *in transitu*, because if he had the power, instead of exercising it he made a contract to have the goods.)

There can be no right of stoppage *in transitu*, unless the goods are in the possession of a third party, for the purpose of carriage. Goods delivered on board the vendee's ship cannot be subject to such a right, for the property vests absolutely in him by the delivery: *In re Humberston* (3), *Ogle* v. *Atkinson* (4). The bills of

(1) 1 R. R. 630 (5 T. R. 402).
(2) 1 Str. 165.
(3) 1 De Gex, 263.
(4) 15 R. R. 647 (1 Marsh. 323; 5 Taunt. 759).

lading make no difference as between the parties; they are nothing more than the master's receipt of the goods. It is true that, in *Lickbarrow* v. *Mason* (1), it was held that the right of *the consignor was divested, as against the assignee of a bill of lading for a valuable consideration; but here the bill of lading was indorsed in blank, and sent by post to the consignees, and from that moment the vendors ceased to have any control over the goods. There was nothing to prevent the vendees from carrying the goods at once to any market they thought fit. Besides, it is impossible to tell what portion of the goods are the proceeds of the bankrupt's money. [*702]

(PARKE, B.: Though a vendor of goods may have been paid part of the price, he has all the rights of an unpaid vendor until the whole has been paid. Suppose Lyon, Schwind & Co., after the goods were shipped, and whilst they held the bills of lading, had sold these goods, would they have been liable to an action? There was a case of *Ellershaw* v. *Magniac* decided in this Court, which is in point, but is not reported.)

Martin said he had been counsel in that case. It was one in which a merchant at Odessa had shipped, by order, a quantity of corn on board a ship bound to England, doubtless meaning at the time to send it in fulfilment of the order which he had received from a person who was not the owner of the ship. Whilst the ship was yet in the harbour, and before the master had signed any bill of lading, and before the shipper had made out any invoice, he received information which induced him to change the destination.

(PARKE, B.: This Court, including the late Lord ABINGER, thought he had a right to vary the consignment.)

In that case the consignor had done no act indicating an intention to vest the property in the consignee. But where goods are shipped on board the vessel of the consignee, sent for that purpose, on his account and risk, the property vests, and the shipper cannot alter their destination. * * In this case no attempt was made to stop the goods *in transitu* until after the messenger was in possession. [They also cited *Walley* v. *Montgomery* (2), *Skiffen* v. *Wray* (3) and *Coxe* v. *Harden* (4), and referred to *Newsom* v. *Thornton* (5).] (6) [703]

(1) 1 R. R. 425 (2 T. R. 63).
(2) 7 R. R. 526 (3 East, 585).
(3) 6 East, 371.
(4) 7 R. R. 570 (4 East, 211).
(5) 8 R. R. 278 (6 East, 17).
(6) The argument upon the Factors Acts and upon misdirection in the Judge's summing up as to fraudulent preference is omitted, as being no longer of importance. *See* the judgment and notes at pages 739 and 742. —J. G. P.

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The *Attorney-General* (*Watson*, *J. Henderson*, and *Atherton* with him), in support of the rule:

[705] It is conceded that a delivery on board the vendee's ship, when unexplained, is a delivery to the vendee; but the bill of lading is the written contract, and is conclusive to prove with what intent the goods were delivered. *Bohtlingk* v. *Inglis* (1) shows that it would have made no difference if the freight had been payable by the consignees. Neither is the case altered by the bill of lading containing the words "freight free," for that is a contract made by the master without the authority of the ship-owner, and the latter may recover the freight on a *quantum meruit*: per MANSFIELD, Ch. J., in *Dewell* v. *Moxon* (2). At what period did the delivery operate? Certainly not at the time of posting the letter containing the indorsed bill of lading: *Alderson* v. *Temple* (3). If the mere parting with the control of a bill of lading vested the property in the consignee, there never could be any stoppage *in transitu*. Although the consignors acquired new rights under the agreement, they are only in the same situation as unpaid vendors who had stopped *in transitu*. The better opinion now is, that the effect of a stoppage *in transitu* is not to rescind the contract, but only to place the vendor in the same position as if he had not parted with the possession of the goods: *Wentworth* v. *Outhwaite* (4). (He was then stopped by the COURT.)

[706] PARKE, B.:

We are all of opinion that there must be a new trial, the question of fraudulent preference not having been correctly submitted to the jury. We will, however, give a judgment in writing, explaining our views of the important questions of commercial law which have been so fully argued before us, so as to prevent the necessity of an appeal (at least to this Court) on the questions of law likely to arise at the trial.

Cur. adv. vult.

The judgment of the COURT was now delivered by

PARKE, B.:

In this case the Court have already intimated their opinion that the rule must be absolute for a new trial, on the ground that the law as to a fraudulent preference of a particular creditor had been

(1) 7 R. R. 490 (3 East, 381).
(2) 1 Taunt. 391.
(3) 4 Burr. 2235.
(4) 62 R. R. 664 (10 M. & W. 436).

laid down by my brother ROLFE so as to operate too favourably for the defendants, the assignees of the bankrupts, inasmuch as his statement of the law was likely to lead to the inference, that, to render a preference on the eve of bankruptcy valid, a threat or pressure, with an immediate power of rendering it available by taking legal steps, was necessary (1). This is certainly not so; for a surety for the bankrupt, or one to whom a debt is due, but not payable, may obtain a valid preference though he has no present power of proceeding against the bankrupt. To defeat a payment or transfer made to a creditor, the assignees must show it to be fraudulent as against the body of creditors entitled under the *fiat*, by proving it to be voluntary on the part of the bankrupt, and in contemplation of his bankruptcy; and if it is made in consequence of the act of the creditor, it is not voluntary.

On the new trial further questions may arise, which were much discussed before us. Lyon, Schwind & Co., the correspondents of the bankrupts at Rio, purchased a large quantity of coffee on their own credit principally, but in *part with funds supplied by the [*707] bankrupts, by the sale in the Brazils of a cargo of coals. For the amount of the purchase on their credit they drew bills on the bankrupts, and the coffee they shipped on board a vessel of the bankrupts at Rio, on the 21st of September. An invoice was made out stating the coffee to be shipped on account and risk of the bankrupts, and transmitted to them; but Lyon, Schwind & Co. procured the captain of the ship to sign bills of lading, making the coffee deliverable to their order or assigns, stating the goods to be freight free. One of these bills they indorsed in blank, and transmitted by post to the bankrupts on the same 21st of September. It arrived in Liverpool on the 12th of November, at which time the bankrupts had committed an act of bankruptcy. At the end of September A. W. Lyon, the agent in England of Lyon, Schwind & Co., asked one of the bankrupts, the principal partner, to cause the bill of lading to be placed in third hands to secure the bills drawn on account of the purchase, to which he agreed. On the 16th of October the bankrupt gave a written order to that effect, and on the 12th of November, after the act of bankruptcy (which was on the 11th), the bills of lading arrived, and were, in pursuance of the above-mentioned agreement, delivered to Lyon for the above-mentioned purpose, who afterwards pledged them for a large advance

(1) See now s. 48 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52).—J. G. P.

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with the plaintiffs, merchants at Rotterdam. The cargo having afterwards arrived, the assignees got possession of it; and an action of trover was brought by the plaintiffs, the indorsees of the bills of lading.

Some questions arising upon the facts of which an outline has been given, it may be necessary to determine on the new trial, besides the question of fraudulent preference, to which the attention of the Court and jury was chiefly directed upon the last trial.

The principal questions are, whether Lyon, Schwind & Co. had
[*708] a right of stoppage *in transitu* when the agreement *of A. W. Lyon with the bankrupts took place; or whether it was then competent to the bankrupts, though voluntary and in contemplation of bankruptcy, to rescind the contract of purchase, as being still unexecuted by actual or constructive delivery, on the principle on which the case of *Atkins* v. *Barwick* was supported, and on which many subsequent cases have proceeded.

The answer to these questions depends upon one fact, whether the coffee was put on board to be carried for and on the account and risk of the bankrupts or not. If it was, the delivery on board put an end to the right of stopping *in transitu*, for the delivery on the vendee's own ship is a final delivery at the place of destination, especially where, as in this case, its final port of discharge was not then determined, and it required further orders at Cork to give the vessel its destination. On that supposition the goods were at their journey's end; for, to adopt the definition of Mr. Paley (Principal and Agent, 352), it was not intended necessarily that they should ever come otherwise into the possession of the buyer than by being in that of the agent for carrying, the master. Now, whether they were delivered on board to be carried for the vendee, (for no doubt Lyon, Schwind & Co. have the rights of vendors, and may consider the bankrupts as their vendees) depends very much on the form of the bill of lading. We had to consider that question in the case of *Ellershaw* v. *Magniac* (1), unfortunately not reported, and lately in that of *Wait* v. *Baker*, in which case the fact of making the bill of lading deliverable to the order of the consignor was properly held decisive to show that no property passed to the consignee, it being clearly intended by the consignor to preserve his title to the goods until he did a further act. The contract for carriage, which the bill of lading is, is made expressly with the consignor, and he no
[*709] doubt *might sue upon it, though in making it he was really acting

(1) 22nd April, 1843.

as agent of and for the consignee. But if he made it as agent for and on behalf of the consignee, the consignee also, as being the real principal, might sue, if there had been a breach of the contract to carry. Notwithstanding the form of the bill of lading, therefore, the contract may have been really made on behalf of the vendee, though *primâ facie* it is made on behalf of the vendor; and it is a question for the jury, to be decided on the evidence, looking at the form of the bill of lading, particularly noticing that it is made freight free, and the language of the invoice, and the immediate transfer of the bill of lading to the bankrupts, and other facts, whether the goods were not really delivered on board to be carried for and on account and at the risk of the bankrupts. If they were, they had arrived at their journey's end when they were delivered on board, and the right of stopping *in transitu*, and also the power of rescinding by the bankrupts, so as to defeat the rights of their creditors, were both at an end.

But if the jury should think, from the form of the bill of lading, that it was intended to preserve the right of the unpaid vendors, until some further act was done by transferring the bill of lading, (in which case the vendors alone could have sued for any breach of the contract to carry and deliver the goods,) the right to stop the goods *in transitu*, and also the power of rescinding, would continue till the bill of lading, indorsed, reached the hands of the bankrupt. In the latter case, as it was competent to the bankrupts to have rescinded the contract altogether, and placed Lyon, Schwind & Co. in their original position, by giving back the goods, we think it was competent also to them to make the agreement which they did make, namely, to place them in the situation of vendors to whom the whole price had not been paid, and give them a lien on the whole for the part not paid.

Two other points remain to be considered. If the jury should be [710] of opinion that the delivery at Rio was final, and therefore that there was no right of stoppage *in transitu*, nor rescinding the contract, it may be that the agent of Lyon, Schwind & Co. supposed that the rights existed, or that they were fairly disputable; and it may be that the bankrupts, or rather the bankrupt who agreed to return the bills of lading to A. W. Lyon, so supposed. Either of these circumstances would materially influence the decision of the question, whether that transaction was a fraudulent preference or not, and ought to be submitted to the jury.

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Another question also, supposing all these points to be decided for the plaintiffs, was raised for the defendants, namely, that the transfer of the bills of lading did not authorise A. W. Lyon to pledge them with the plaintiffs, so as to give a title to them, even for a valuable consideration. This will be for the decision of the jury, and depend upon their view of the agreement to place the bills of lading in Lyon's hands, whether it was meant to be a mere deposit or pledge, to be kept in his hands, or it was intended that he should transfer them in order to raise money for the payment of the bills (1).

All these questions, which we have stated at length in order to a final decision of this case, which is of so much importance to the parties, in a pecuniary point of view, must be left to the jury.

Rule absolute.

The cause was again tried at the Summer Assizes, 1848, before ERLE, J., who left the several questions to the jury, in accordance with the above judgment. The defendants' counsel tendered a bill of exceptions; but the jury having found for the defendants on the question, whether the goods were delivered on board for and on account and at the risk of the bankrupts, and also on the question [*711] of fraudulent *preference, a general verdict was entered for the defendant; and in Michaelmas Term, 1848, the COURT refused a motion by the *Attorney-General* for a new trial.

1848. *June* 29.

[711]

RIDLEY *v.* THE PLYMOUTH, STONEHOUSE, AND DEVONPORT GRINDING AND BAKING COMPANY. THE KINGSBRIDGE FLOUR MILL COMPANY *v.* SAME.

(2 Ex. 711—719; S. C. 17 L. J. Ex. 252; 12 Jur. 542.)

Joint-stock Companies completely registered under the 7 & 8 Vict. c. 110 (2), are bound by contracts made by a competent board of directors, though not under seal, or made in compliance with the requisites of the 44th section; though, *semble*, they cannot enforce such contracts.

But persons seeking to render those Companies liable on contracts made with the directors, must show their authority to bind the Company, either

(1) See now secs. 9 and 10 of the Factors Act, 1889 (52 & 53 Vict. c. 45). —J. G. P.

(2) Repealed by 25 & 26 Vict. c. 89, s. 205; see now s. 37 of the Companies Act, 1867 (30 & 31 Vict. c. 131).—J. G. P.

by the production of the registered deed of settlement, or by proof that the body of shareholders authorised particular individuals to make contracts binding on the Company. A ratification or admission by a competent board of directors will bind the Company.

ASSUMPSIT. The first count of the declaration stated that the Company, before and at the time of making of the promise &c., was a joint-stock Company, completely registered and incorporated according to and by virtue of the provisions of the 7 & 8 Vict. c. 110, intituled &c.: that the complete registration of which Company was duly certified according to the provisions of the same Act, by the Registrar of Joint-stock Companies: that the Company held certain premises, as tenant to one J. Bickford, at the yearly rent of 30*l.*; and in consideration that the plaintiff, at the request of the Company, had become tenant to the Company of those premises, at the rent of 5*l.* per quarter, the Company promised the plaintiff, that, so long as they continued tenant to J. Bickford, and so long as the plaintiff continued tenant to them, they would indemnify and save him harmless from and against the payment of any of the rent so payable to J. Bickford, over and above the amount of rent payable to them which might from time to time be due and in arrear, and from and against any distress or costs, charges, damages, or expenses which should or might be made, rise, or happen to the plaintiff, for or by reason of the non-payment of the rent, from and against the payment whereof the Company so promised to indemnify him. Averment, that, during the continuance of the tenancies, and *at a time when only a small part of the [*712] rent payable to the Company was due and in arrear, the Company, disregarding their promise, would not indemnify or save harmless the plaintiff, by means whereof a distress was made by J. Bickford on divers goods and chattels of the plaintiff then being in and upon the said premises, for the sum of 37*l.* 10*s.*, then due and in arrear from the Company to J. Bickford, for and in respect of the rent so payable to him, and the plaintiff was compelled to pay 37*l.* 10*s.*, together with the costs of the distress, to redeem his goods, &c. There was also a count for money paid.

The defendants pleaded, first, to the whole declaration, *non assumpserunt;* secondly, to the first count, that the Company did not hold the premises as tenants to J. Bickford, at the yearly rent of 30*l.*; thirdly, to the same count, that the plaintiff was not damnified *modo et formâ*. Upon which issues were joined.

At the trial, before Wightman, J., at the Devonshire Spring Assizes, 1848, it appeared that the defendants were a joint-stock

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Company completely registered, and consisting of eleven directors. In the month of December, 1846, the plaintiff took possession of certain premises, under the following agreement:

"STONEHOUSE, 10th December, 1846.

"Mr. Henry Ridley agrees to take, and the Grinding and Baking Company agree to let those two front under stores situated in Newport Street, Stonehouse, with right of landing all goods free of all dues on the same, for the term of six months certain, with liberty to occupy for twelve months, at the yearly rental in full of 20*l.* per annum, the aforesaid rent to be paid quarterly, and three months' notice to be given by either party at the expiration of the term above mentioned.

"Signed, for the Company,
"THOMAS LUDD, Secretary.
"HENRY RIDLEY.

"Witness, EDMOND FORD."

[713] The attesting witness, Ford, was the managing director of the Company. Ludd, who was examined as a witness, said that he entered into the agreement by the authority of the Company, acting as their secretary; and he produced it at the next board meeting, at which, however, only four directors were present. It appeared that Ludd was not in fact appointed secretary until after the agreement was signed. Ludd also stated, that he had heard the directors speak of an agreement in writing with Bickford for a tenancy. On the 15th of June, 1847, Bickford put in a distress upon the plaintiff's goods for 37*l.* 10*s.*, rent due from the Company, when the plaintiff paid that amount and costs in order to redeem his goods. On the same evening the plaintiff's attorney went to a board meeting and complained of the distress, when Ford, who was then chairman, said, "They were very sorry that Bickford had been hasty; that they would see Bickford next morning; they were short of funds, but would arrange by paying part if they could." No other evidence was offered of the tenancy of the Company to Bickford.

It was objected, on behalf of the defendants, first, that, being a corporation, they could not contract except under seal, or, at all events, the plaintiff was bound to prove affirmatively that the persons making the contract had power to bind the shareholders; secondly, that Ludd had no power to bind the defendants by the agreement which he entered into; thirdly, that the statements of

the directors were not evidence against the Company of their tenancy under Bickford, which ought to have been proved by the written agreement. The defendants then put in their deed of settlement, which was objected to by the plaintiff as being no evidence against him. By this deed five directors were required to be present at a board meeting. The learned judge directed a verdict for the plaintiff, reserving leave for the defendants to move to enter a nonsuit.

A rule *nisi* having been obtained accordingly, [714]

Crowder and *Greenwood* showed cause:

First, a joint-stock Company, completely registered under the 7 & 8 Vict. c. 110, is only a corporation for particular purposes. That is evident from the preamble of the statute, which recites (amongst other things), that it is expedient, after complete registration, "to invest such Companies with the qualities and incidents of corporations, with some modifications and subject to certain conditions and regulations." They are peculiarly distinguished from ordinary corporations by the 25th section, which enacts, that, on complete registration being certified, the shareholders "shall be and are hereby incorporated, as from the date of such certificate, by the name of the Company, as set forth in the deed of settlement, and for the purpose of carrying on the trade or business for which the Company was formed, but only according to the provisions of this Act, and of such deed as aforesaid, and for the purpose of suing and being sued, and of taking and enjoying the property and effects of the Company," &c., "but so as not in anywise to restrict the liability of any of the shareholders of the Company under any judgment, decree, or order for payment of money," &c.; "but every such shareholder shall, in respect of such monies, and subject as after-mentioned, be and continue liable as he would have been if the said Company had not been incorporated." The 44th section, which regulates contracts entered into on behalf of these Companies, (with certain exceptions, not material to the present question), enacts, "that every such contract shall be in writing, and signed by two at least of the directors of the Company on whose behalf the same shall be entered into, and sealed with the common seal thereof, or signed by some officer of the Company on its behalf, to be thereunto expressly authorised by some minute or resolution of the board of directors, applying to the particular case; and that, in the *absence of such requisites, or of any of them, any such [*715]

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contract shall be void and ineffectual, (except as against the Company on whose behalf the same shall have been made)." It may be that a Company who has not complied with the requisites of that section cannot derive any benefit from the contract; but such Company is, nevertheless, liable to be sued upon it. It would be unreasonable to introduce formalities, by omitting which the Company might be enabled to avoid their contracts.

(PARKE, B.: It cannot be said that every individual member has power to bind the Company by a contract, and there was no evidence to show that these directors had any authority.)

The third section of the 7 & 8 Vict. c. 110, defines the word "directors" to mean "the persons having the direction, conduct, management, or superintendence of the affairs of a Company." Here the agreement was made with persons holding themselves out to the world as managers of the Company, and who by usage act for the general body of shareholders. Then, as to the objection that Ludd had no power to bind the Company by the agreement.

(PARKE, B.: If the board had power to demise, there is evidence that they impliedly sanctioned the agreement. But suppose the board had themselves agreed originally to demise, the plaintiff has not produced the evidence necessary to show their authority to bind the Company.)

With respect to the last point, the language of the chairman, when the plaintiff's attorney complained to the board of the distress, is evidence of an existing tenancy, and a liability in respect of it.

(PARKE, B.: It is no evidence in support of the first count, for there is an issue upon the precise terms of the holding. It may, however, be some evidence under the count for money paid; for, if the board had power to bind the Company, they might make admissions which, on the authority of *Slatterie* v. *Pooley* (1), would
[*716] render other *proof unnecessary. It was, therefore, some evidence to go to the jury of a promise by the board to recompense the plaintiff for the distress.)

Butt, (with whom was *Collier*), in support of the rule, argued that the agreement was not a matter connected with the business for which the Company was incorporated, and that the plaintiff

(1) 55 R. R. 760 (6 M. & W. 664).

was bound to show that the requisites of the 44th section of the 7 & 8 Vict. c. 110 had been complied with, or at least to give some proof that the persons acting as directors had authority to bind the Company; which might be done by producing the copy of the deed of settlement, which is, by the 7th section of that Act, required to be registered. (He was then stopped by the COURT.)

PARKE, B.:

The rule must be absolute. With regard to the first objection, I am satisfied that, under this Act of Parliament, these *quasi* corporations are bound by their contracts, though not under seal, and though they have not complied with the requisites of the 44th section. That section contains a clause, "that, in the absence of such requisites, or any of them, such contract shall be void and ineffectual, except as against the Company on whose behalf the same shall have been made." If, then, this contract has in fact been made by the Company, they cannot object that it was not under seal; but it is competent for them to say that the contract was not made by their agents having authority to bind them. In an ordinary partnership, at common law and by usage of trade, one partner has power to bind his copartners in all contracts within the scope of the partnership dealing. But, with regard to these joint-stock Companies, which are for some purposes a partnership consisting of a great number of individuals, the same rule does not apply; for instance, one member could not bind the Company by signing a bill of exchange, *or entering into other similar contracts. The [*717]
question then is, who has authority to bind them? Now, the 7 & 8 Vict. c. 110, s. 7, provides, that there shall be no complete registration of such a joint-stock Company until a copy of their deed of settlement shall have been delivered to the Registrar of Joint-stock Companies. It is, therefore, competent to every person dealing with such a Company to ascertain the objects of the Company, for the deed must specify them, and also who the directors are; and any person may find in that deed the duties of the directors and their powers as between them and the Company. Therefore, every person seeking to bind the Company by a contract with the directors, must give some proof of their authority. I perfectly agree that the liability of the Company may be shown without producing the original deed, or a copy of it, provided it be shown that all persons who formed the Company had sanctioned any particular individuals entering into contracts to bind them; if there were any proof of

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such authority, no doubt the Company would be bound. This case fails, because it is not shown that the persons who entered into the contract, that is, the directors present at the board meeting, when there was some evidence of their sanctioning the agreement, were competent to bind the Company. It is said that there is some usage of trade, that the directors of these Companies shall bind them. That must depend on the particular terms upon which the business of the Company is carried on; and no evidence has been given on that subject. Therefore, in the first place, the plaintiff has failed in showing a competent authority to enter into the contract; and when the deed is produced, it appears that the directors present at the meeting when the agreement was by implication sanctioned, were not of a sufficient number to bind the rest of the shareholders; and unless all are bound, the action cannot be maintained. With respect to the agreement itself, although Ludd, [*718] who *signed it, was not at that time secretary, still it was clearly entered into on behalf of the Company, and if it had been sanctioned by the number of directors sufficient to enter into contracts, it would have bound the Company. But it appears to have been sanctioned at a board meeting, at which the requisite number of directors were not present; and consequently the defendants are not bound by it.

PLATT, B.:

I am of the same opinion. Had there been a contract under seal, it might have been taken for granted that the persons who caused the seal to be impressed on the particular instrument had authority to bind the Company. That, however, is not the case here; consequently, it was necessary to show that the contract was entered into by a number of the governing body competent to bind the Company.

Rule absolute.

THE KINGSBRIDGE FLOUR MILL COMPANY *v.* THE PLYMOUTH, STONEHOUSE, AND DEVONPORT GRINDING AND BAKING COMPANY.

This was another action against the same Company for flour supplied by order of the secretary; and a board of directors, consisting of less than five persons, had acknowledged the debt.

Crowder appeared to show cause, and attempted to distinguish this case from the preceding, inasmuch as the flour had been

consumed on the premises of the Company, and in the course of their trade.

PARKE, B.: You cannot make persons liable as contracting parties without *showing that they directly or indirectly authorised the contract. Now, according to the terms of the deed, it would have been sufficient if five directors had authorised the secretary or a servant to purchase the flour, or if they had ratified the acts of those who did order it. But no such proof is given. The rule must, therefore, be absolute to enter a nonsuit.

[*719]

Rule absolute.

ALLEN *v.* EDMUNDSON (1).

1848. *June* 28.

(2 Ex. 719—725; S. C. 17 L. J. Ex. 291.)

[719]

The holder of an overdue bill of exchange went during business hours to the counting-house of the drawer, for the purpose of giving notice of dishonour, and finding the counting-house shut, he knocked at the door, and no one answering, he came away without leaving any notice: Held, that these facts did not support an allegation of due notice, but were equivalent to a dispensation of notice, and ought to have been so pleaded.

Semble, that the holder might have treated the absence of the drawer from his place of business as an excuse for delivery of notice on the proper day, and that a delivery at the first opportunity, on a subsequent day, would have supported an averment of due notice.

DEBT for goods sold, &c. Plea: that the defendant drew a bill of exchange, and indorsed it to the plaintiff on account of the debt; that the bill was dishonoured; and "although the time for giving due notice of dishonour had elapsed before the commencement of the suit, and although such notice might have been given, yet the defendant had not at that time, nor at any time thereafter, had due notice of the dishonour of the bill." Replication, that the defendant had due notice; upon which issue was joined.

At the trial, before Rolfe, B., at the Liverpool Spring Assizes, 1848, it appeared that both the plaintiff and defendant resided in Manchester. The bill was dishonoured in London, on Saturday, the 2nd of October, and was sent from London on the following Monday, and received by the plaintiff, in Manchester, on Tuesday the 5th of October. On the same day the plaintiff sent it, during business hours, to the defendant's counting-house. The messenger found it

(1) Compare ss. 45 (3), 46 (2), 49 (8), and 50 (2) of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61); and see *Studdy* v. *Beesty* (1889) 60 L. T. 649.—J. G. P.

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shut up; he knocked at the door of the counting-house, and no one answering, he came away. On the following day he again went, and found nobody there but a boy, playing on the stairs, who said he was the son of the defendant, and that his father was in London. [*720] No notice *was left with this boy. On the Monday following, the plaintiff served the defendant with formal notice of dishonour, when he said it was too late. The boy, who was called as a witness for the defendant, said that his father went to London on the Tuesday, and returned on the following Monday, and that, during his absence, the witness remained in charge of the counting-house, and was constantly there during the hours of business. He also said, that if any notice had been left with him he would have forwarded it to his father. The plaintiff's counsel relied upon *Crosse* v. *Smith* (1) as an authority to show that the knocking at the counting-house door on the Tuesday, was, in point of law, notice of dishonour. The learned Judge told the jury to find for the plaintiff, if they believed that he sent to the defendant's place of business, during business hours, for the purpose of giving notice of dishonour, and the messenger knocked, and found no one there. The jury having found for the plaintiff, leave was reserved for the defendant to move to enter a nonsuit, if the Court should be of opinion that there was no evidence of notice of dishonour.

A rule *nisi* having been obtained accordingly.

Atherton showed cause:

The facts proved support the averment of notice. It will probably be argued that such averment can only be proved by a notice in fact, either verbal or in writing; but that is not so. The notice might have been sent by post, or, the place of business being closed, put through the door; in which cases the defendant might have been able to show that it never reached him. That circumstance, however, would not negative the averment of notice, which renders it evident that notice does not mean something which has come to the knowledge of the party, but the doing certain acts [*721] which the law recognises *as notice. Here what the plaintiff did was clearly equivalent to notice. If the facts had been set out specially in a plea, it would have been bad as a statement of evidence in support of an averment of notice. It is admitted that it would have been sufficient to have left the notice with any person at the defendant's place of business.

(1) 14 R. R. 529 (1 M. & S. 545).

(PARKE, B.: In *Housego* v. *Cowne* (1), we held that a notice left with the drawer's wife, at his house, was sufficient.)

In this case, if the party had gone through the idle ceremony of speaking the notice, that would have amounted to no more than what was done. [He cited *Crosse* v. *Smith* (2).] In the case of a foreign bill, if a notary went to present it at the proper hours of business, and found the counting-house closed, he would protest it for non-payment; but in an action on such bill, special circumstances would not be stated, but the only allegation would be that the party had notice of dishonour.

(PLATT, B., referred to *Firth* v. *Thrush* (3).)

Martin, contrà:

Notice of dishonour means a communication *to the party that [*722] the bill is unpaid, coupled with a demand for payment. Then how can circumstances showing that no notice was given, because it could not be given, prove the allegation that notice was given? If the facts amount to a dispensation of notice, the plaintiff should have replied it: *Burgh* v. *Legg* (4). Under this allegation he is bound to prove a notice in fact.

(ALDERSON, B.: In *Carter* v. *Flower* (5), the COURT say, "It is clear that, if no notice has been given at any time, the excuse ought to be set out on the record; if it has been given, but at a time when it would be too late in the usual course, the matter of excuse might probably be used to show that it was, under the circumstances, in a reasonable time; but, if not given at all, the record must state a sufficient excuse.)

In *Crosse* v. *Smith*, the present point did not arise; for, under the old system of pleading, it was unnecessary to decide whether the facts amounted to actual notice, or a dispensation of it.

PARKE, B.:

We are all agreed that the rule ought to be absolute to enter a nonsuit, but the plaintiff may have a new trial on payment of costs. The point for consideration is, whether what occurred on the first day, on going to the defendant's counting-house, was, in point of

(1) 46 R. R. 620 (2 M. & W. 348).
(2) 14 R. R. 545 (1 M. & S. 545).
(3) 32 R. R. 421 (8 B. & C. 387).
(4) 52 R. R. 788 (5 M. & W. 418).
(5) 73 R. R. 706 (16 M. & W. 749).

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law, due notice within the meaning of the allegation in the replication. On the authority of *Crosse* v. *Smith* (1), my brother ROLFE thought it was, but we granted a rule in order to consider whether *Crosse* v. *Smith* went to that extent, and whether the allegation was satisfied by the proof. Since the case of *Crosse* v. *Smith*, there has been that of *Solarte* v *Palmer* (2), a solemn decision of the House of Lords, which has been followed by many others, in which, though the strictness of the rule laid down in *Solarte* v. *Palmer* has been

[*723] modified, particularly by this *Court, in *Bailey* v. *Porter* (3), still a notice of dishonour requires a certain formal intimation that the bill has been duly presented and not paid, and that the party giving notice means to hold the other party liable. That latter requisite, according to subsequent cases, need not be positive and express, because it is implied from the fact of the bill being presented. Both *Crosse* v. *Smith*, and the prior case of *Goldsmith* v. *Bland*, were decided before the formalities necessary on giving notice of dishonour were settled and acted on; and in *Crosse* v. *Smith* the pleadings were not such as to make it necessary for the Court to distinguish between a dispensation of due notice and the giving of due notice. In that case, Lord ELLENBOROUGH laid down, that the going to the counting-house during business hours, and finding no one there to receive the notice, was equivalent to a dispensation of notice, since, according to the usage of trade, a merchant who puts his name to a bill ought to be ready at his place of business to receive notice of the bill's dishonour. In fact, he engages that he will, by himself or his servant, be there; and it is enough for the party who has to give intimation of dishonour, to go to that place, and be ready to deliver it. If the merchant be not there, it is his own fault; the holder has done all that is required, and the not having found any party at the place of business to receive the notice, is equivalent to a dispensation of it. Therefore, there is no doubt of the propriety of the decision of *Crosse* v. *Smith*. But I cannot accede to that case, so far as to make the act of going and knocking at the door equivalent to actual notice. If the plaintiff had sent a written notice by post, or had left it by putting it through the door, that would have been an intimation of dishonour, in proper course to be received by the party; or, if the plaintiff found a person there and delivered a verbal notice, that would have been enough.

[*724] But if he *does neither, it is insufficient, unless the facts amount to

(1) 14 R. R. 545 (1 M. & S. 545).
(2) 37 R. R. 34 (1 Bing. N. C. 194).
(3) 69 R. R. 656 (14 M. & W. 44).

a dispensation of notice. In the present case the allegation in the replication is not proved, and there has been no intimation of dishonour to satisfy the issue. That allegation means that the plaintiff has given intimation of the bill's dishonour in the way in which he ought to do, according to the usual custom of trade. Now, though there has been a dispensation of notice, the plaintiff does not rely on that, but takes issue on the fact of notice. It is unnecessary to consider whether the plaintiff might not have treated the absence of the party, not as a dispensation from giving any notice, but merely as an excuse for not delivering it on that day—for he was not bound to go more than once—and whether, if he had gone the day after and delivered it, that would have been enough; for that point was not taken at the trial, and our attention is confined to what was done on the first day. Perhaps, if the plaintiff had gone the day after he saw the boy, and delivered a written notice, it would have been a question for the jury, whether he ought not to have left a notice the day before, when he found a person at the counting-house to receive messages. That would depend upon whether the person was a mere boy, or a clerk who kept the books. If he chose to consider the absence of the party from his counting-house as an excuse for delaying the notice, he might treat the notice on Monday as due notice, provided he had no immediate opportunity of serving a better notice. That would again leave the question open, whether, when he saw the boy, he might not have delivered a better notice. But if he chooses to rely on the attempt on the first day as an excuse for notice altogether, the pleadings ought so to have stated it. The rule will, therefore, be absolute for a new trial, on payment of costs of the trial within a week, the plaintiff to be at liberty to amend his replication on payment of the costs of the amendment. Otherwise, a nonsuit to be entered.

ALDERSON, B.: [725]

Solarte v. *Palmer* decided this question also, when it decided that a notice of dishonour required a statement of particular matters. It is impossible to say that the knocking at a door is a statement of one thing more than another. The circumstances must, therefore, amount to a dispensation of notice, and ought to have been pleaded as such.

ROLFE, B.:

Since the case of *Solarte* v. *Palmer*, the expression, "notice of

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dishonour," means something beyond mere notice: there must be a demand also. It is clear that knocking at a door cannot be a demand.

PLATT, B., concurred.

Rule absolute accordingly.

1848. *June* 28.

[725]

ELLIOTT *v.* THE SOUTH DEVON RAILWAY COMPANY.

(2 Ex. 725—731; S. C. 17 L. J. Ex. 262.)

On the trial of an issue whether a railway was passing through a "town" within the meaning of the Railway Clauses Consolidation Act (8 & 9 Vict. c. 20, s. 11), the Judge merely told the jury that the word "town" was to be understood in its ordinary and popular sense: Held, a misdirection, inasmuch as the Judge ought to have given such a definition of the word "town" as would have enabled the jury to decide the issue. "Town," in that Act, means a collection of inhabited houses so near to each other that they may reasonably be said to be continuous, and the term will include a space of open ground surrounded by continuous houses; and, *semble*, all open spaces occupied as mere accessaries to such houses, although not so surrounded(1).

THIS was an issue directed by the VICE-CHANCELLOR OF ENGLAND, to try whether the South Devon Railway, in deviating from the level in passing over land of which the plaintiff was the owner and occupier, was passing through a "town," within the meaning of the 11th section of the Railway Clauses Consolidation Act, 8 & 9 Vict. c. 20, which enacts, that, "in making the railway, it shall not be lawful for the Company to deviate from the levels of the railway, as referred to the common *datum* line described in the section

[*726] approved of by Parliament, and as *marked on the same, to any extent exceeding in any place five feet, or in passing through a town, village, street, or land, continuously built upon, two feet, without the previous consent, in writing, of the owners and occupiers of the land in which such deviation is intended to be made."

At the trial, before Wightman, J., at the Exeter Spring Assizes, 1848, it appeared that the plaintiff was the owner and occupier of certain fields, which, a few years ago, were unquestionably in

(1) See *Reg.* v. *Cottle* (1851) 16 Q. B. 412, 20 L. J. M. C. 162; *Commissioners of Milton* v. *Faversham*, 10 B. & S. 548, *n.*; *Lord Carington* v. *Wycombe Railway Co.* (1868) L. R. 3 Ch. 377, 37 L. J. Ch. 213; *L. & S. W. Ry. Co.* v. *Blackmore* (1870) L. R. 4 H. L. 610, 615, 39 L. J. Ch. 713; *Collier* v. *Worth* (1876) 1 Ex. Div. 464, 35 L. T. 345.—J. G. P.

the country. The town of Plymouth had, however, considerably increased, and the land adjoining the plaintiff's was now built upon, so that his land was on three sides bounded by houses and streets. On the fourth side it was bounded by building land, not yet built upon. The roads, for some distance beyond the plaintiff's land, were lighted, paved, and watched by the Commissioners acting in execution of the local Act, 5 Geo. IV. c. xxii. Although the plaintiff's land was, from its situation, very likely to be soon built upon, and was of great value as building land, it was as yet used as pasture land. By the VICE-CHANCELLOR'S order it was admitted, that the railway, in passing over the plaintiff's land, had deviated from the level, as referred to the *datum* line, more than two and less than five feet, without the plaintiff's consent. The learned Judge told the jury that the word "town," as used in the Act, was to be understood in its ordinary and popular sense; and that it was for them to decide whether the plaintiff's land was in a "town," within the meaning of the Act of Parliament; that the assessment and payment of rates under the local Act was not a test. The jury found that the railway on the plaintiff's land was passing through a town, within the meaning of the Act.

A rule having been obtained, calling on the plaintiff to show cause why there should not be a new trial, on the ground of misdirection on the part of the learned Judge in not properly explaining to the jury the meaning of the word "town:"

Cockburn and *Montague Smith* showed cause: [727]

The word "town,' in the Act of Parliament, has no legal or technical meaning, but is used in its ordinary and popular sense, and therefore did not require any definition. Whether these fields were "town" was a question of fact, which the jury were as competent to decide as the Court. In Johnson's Dictionary, "town" is said to be "any collection of houses larger than a village."

(ALDERSON, B.: It is where a great body of people within a township are congregated together in houses. It means land continuously built upon. There can be no doubt that the green of Grosvenor Square is in "town." So, a railway passing through the Temple Gardens would be passing through a town.

PLATT, B.: St. James's Park is in "town.")

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The word is used in contradistinction to the term "country." This piece of ground is rateable under the 5 Geo. IV. c. xxii., "for better paving, lighting, cleansing, watching, and improving the town and borough of Plymouth;" the 105th section of which enables the Commissioners to assess (amongst other things) "all gardens, tenements, and hereditaments adjoining to or upon any of the streets, lanes, roads, passages, or other public places, which are already made or built, or which shall hereafter be made or built, within the populous or town part of the said borough."

(ROLFE, B.: The case resembles *Baddeley* v. *Gingell* (1), where we had to determine whether certain houses were "within the street," for the purpose of rating them. When a word used in an Act of Parliament is of doubtful import, the Judge ought to explain it.)

Suppose any question arose upon the word "moor," in an Act of Parliament, would the Judge be bound to tell the jury what, in point of fact, a moor was?

(ALDERSON, B.: The jury should have been told that the meaning of the statute was, to give protection to persons who had a collec-
[*728] tion of houses together; and that, *putting a liberal construction on the word "town," they should see whether this land was fairly within the ambit of a collection of houses. The Judge need not give an exact definition of where a township begins, and a village ends; but he ought to give the jury intimation of what their attention is to be directed to.

ROLFE, B.: In Co. Litt. 115 b, it is said, "that a place cannot be a town in law, unless it hath, and in time past hath had, a church and celebration of Divine service, sacraments, and burials." No doubt the word "town" in this Act means something different from the legal acceptation; and there would have been no misdirection, if the Judge had laid down such a definition as would have enabled the jury to come to a correct conclusion.)

The learned Judge called the attention of the jury to the facts of the case, and left it to them to say whether, under all the circumstances, this land was "town."

(1) 74 R. R. 683 (1 Ex. 319).

Kinglake, Serjt., in support of the rule:

The 272nd section of the Company's Act (7 & 8 Vict. c. lxviii.) prohibits any deviation from the levels, "to any extent exceeding in any place five feet, or, in passing through towns, two feet, without the consent of the owners, lessees, and occupiers of the land." The 11th section of the Railway Clauses Consolidation Act (8 & 9 Vict. c. 26) uses the words, "in passing through a town, village, street, or land continuously built upon." Is, then, the same definition to apply to each subject-matter different in its nature? If a town varies from a village, and a village from a street, it becomes a question whether land continuously built on, on three sides, and open on the other, is a "town, village, street, or land continuously built on," within the meaning of the Act. There must be some definition applicable to each of these particular subject-matters, and they ought to be defined, notwithstanding the definition may be difficult. Whether this land is "town," is a mixed question *of law and fact; and the learned Judge ought to [*729] have explained to the jury what "town" is, within the meaning of the statute, and have left it to them to say whether this land is "town" within it. The proper definition is a place within the ambit of which inhabitants have collected for the purpose of residence. That would include an open space surrounded with houses, such as Grosvenor Square, but not the mere suburbs of a town. The learned Judge ought to have laid down some rule by which the jury would be satisfied that this land was "town" within the meaning of the Act. In the absence of any definition, it is not likely that the jury would come to a correct conclusion.

(PARKE, B.: In the city of York, there are public gardens within the walls.)

Here the railway does not touch a house or cross a street until after it has left the plaintiff's land.

PARKE, B.:

There must be a new trial. The learned Judge was certainly not bound to define the meaning of the word "town," so as to embrace every possible case, yet he ought to have given a definition sufficient to enable the jury to decide the present question, which is, whether the railway can be considered as passing through a "town," within the meaning of the Act of Parliament. It would appear that the

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word "town" is not to be understood in its strict legal interpretation, as a township having a church or a constable, but a place containing a number of houses congregated together—an inhabited spot where the occupation is continuous. No railway entering the boundary of that town can be raised two feet without the consent of the persons through whose land it passes. Does, then, this railway enter the boundary of collected masses of houses? I think not. But it is a question for the jury, whether this open space is continuously surrounded with houses. Such a space may be part [*730] of a town, although not built upon, if there are masses of *houses around it; as, for instance, the green of Grosvenor Square. Unless, therefore, this piece of land is surrounded with houses, so that the railway, in passing the boundary of it, enters masses of inhabited houses, the case is not within the Act. I do not mean to say that the open space must be surrounded with houses touching each other, but only continuously surrounded with houses in the popular sense of the word "continuous." There ought to be a new trial, in order that the Judge may define the meaning of the term "town" in this Act of Parliament.

ALDERSON, B.:

I am of the same opinion. What the walls of towns were in ancient times, that is, a boundary, continuous buildings are now. By continuous buildings I do not mean buildings which touch each other, but buildings so reasonably near that the inhabitants may be considered as dwelling together. Within the ambit surrounded by such houses is town, and when the railway passes through that ambit it passes through town. I entertain some doubt whether this space is town: it appears to me country land extending to the town, and not town itself.

ROLFE, B.:

The verdict in this case is wrong, because the jury have not been properly directed as to the point to which they should apply their attention. The learned Judge was bound to define the meaning of the word "town" sufficiently, for the purpose of enabling the jury to decide the issue. No doubt it is difficult to lay down a definition which would meet every case. At first I thought the definition of my brother PARKE was right, but it occurred to me that in foreign towns there are what they call a "place"—a parallelogram of ground, with houses on three sides only, and on the fourth, a

garden cultivated and adorned for the sake of these houses, but opening upon the country. Such a spot would, no doubt, be town, although it *is not continuously surrounded with houses. I point to this in order to show the difficulty of giving an accurate definition which shall meet all cases. Here it was necessary to define what the jury were to consider as "town," and what not.

PLATT, B.:

The learned Judge ought certainly to have explained to the jury the meaning of the word "town" in the Act of Parliament, and, that explanation not having been given, there ought to be a new trial.

ALDERSON, B., added:

I think such a "place" as my brother ROLFE alludes to would be in a town, if the garden was occupied as an accessory to the dwelling-houses; otherwise, if it were an inlet to the country.

PARKE, B.:

I think so too. Probably a garden attached to a house, and occupied along with it, should be reckoned as part of the house in considering whether the houses are continuous. The question will depend upon whether this space is surrounded with houses in the popular sense of the word "houses," so as to be within the ambit of the town.

Rule absolute.

COOKE AND FARQUAR *v.* SEELEY AND ANOTHER (1).

1848. *June* 30.

[746]

(2 Ex. 746—751; S. C. 17 L. J. Ex. 286.)

The fact of an account having been opened with a banker by one of two partners in his own name, is not conclusive to show that the account was opened on his own behalf; but it is competent for the banker to prove that he was acting as the agent of the partnership, and that the account was theirs. The mere circumstance, however, of the money deposited being partnership property, is not sufficient for that purpose.

ASSUMPSIT. The declaration contained a special count for a breach of contract by the defendants, as bankers, in not honouring the plaintiff's cheque; also a count for money lent. The defendants pleaded (with other pleas) *non assumpserunt*.

At the trial, before Platt, B., at the Somersetshire Spring Assizes,

(1) See *The Alliance Bank* v. *Kearsley* (1871) L. R. 6 C. P. 433, 438, 40 L. J. C. P. 249.—J. G. P.

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1848, it appeared that the plaintiff, Farquar, had opened an account with the defendants, who were bankers at B ridgewater. Farquar carried on business under the name of the Bridgewater Coal Company, and Cooke, the other plaintiff, was a dormant partner in the concern; but that fact was unknown to the defendants. The pass-book, which, as usual, was alternately in the possession of the banker and the customer, was headed "John Farquar, Esq., B. C. C." (meaning "Bridgewater Coal Company"). It was proved that some of the partnership monies had been at times paid into this account, and a letter was put in evidence, written by Farquar to the defendants, in which he spoke of "withdrawing the Company's account." On the part of the defendants it was submitted, that the account was opened by Farquar on his own behalf, and that there was no evidence to go to the jury of the plaintiff Cooke being a party to the contract; and *Sims* v. *Brittain* (1) and *Sims* v. *Bond* (2) were cited. The learned Judge, being of that opinion, nonsuited the plaintiffs.

[747] *Crowder* obtained a rule, calling on the defendants to show cause why the nonsuit should not be set aside, and a new trial granted; against which—

Kinglake, Serjt., *Barstow*, and *Phinn*, showed cause:

Upon the evidence the nonsuit was right. The relation of banker and customer creates a contract of a special nature: *Pott* v. *Clegg* (3). A breach of such contract is charged in the first count; and there is a distinct issue as to whether both Farquar and Cooke were customers of the Bank. The facts show that the contract was with Farquar alone, and that renders inapplicable the rule laid down in *Cothay* v. *Fennell* (4), where it is said, "If an agent makes a contract in his own name, the principal may sue and be sued upon it; for it is a general rule, that whenever an express contract is made, an action is maintainable upon it, either in the name of the person with whom it was actually made, or in the name of the person with whom in point of law it was made." *Skinner* v. [748] *Stocks* (5) is to the same effect. * * The act of Farquar, in opening an account in his own name, amounts to a declaration that the account is opened for himself individually, and not on behalf of the Company.

(1) 4 B. & Ad. 375.
(2) 39 R. R. 511 (5 B. & Ad. 389).
(3) 73 R. R. 517 (16 M. & W. 321).
(4) 34 R. R. 541 (10 B. & C. 671).
(5) 23 R. R. 337 (4 B. & Ald. 437).

(PARKE, B.: It is a question of fact, whether he was acting on his own behalf in lending the money, although he got it from the partnership, or whether he was lending the partnership money. The circumstance of the pass-books having the letters "B. C. C." in them, was some evidence for the jury that he was lending the money on behalf of the partnership.)

Where a contract was made by one of several partners in his individual capacity, who at the time declared that the subject-matter of the contract was his property alone, it was held that his declaration was evidence against all the partners, and therefore they could not sue jointly on such a contract: *Lucas* v. *De La Cour* (1).

(ALDERSON, B.: In that case there was the declaration of one partner that the property belonged to him alone, so there could be no reasonable doubt that the contract was made with him only, and not jointly with the other partners. The difficulty here is, that it is ambiguous.)

Beckham v. *Drake* (2) has no bearing on the present point; the question there being, whether a dormant partner could be joined in an action for the breach of an agreement, though not a party named in or signing it. *Emly* v. *Lye* (3), and *Siffkin* v. *Walker* (4), were cases on bills of exchange, and on that ground distinguishable. In *Trueman* v. *Loder* (5), Lord DENMAN, Ch. J., says, "Some cases were quoted, in which *the question, whether an agent or partner [*749] bound himself only, or his principal or firm, has been held to depend upon his intention to deal for himself, or for the principal or partnership. But on examining all those cases, it will be found that the contracting party was carrying on two different concerns, one for himself, the other for his principal or his firm. The world would know him in two different characters; and each party dealing with him was bound to inquire in which he appeared on any particular occasion." Here, Farquar having had dealings with the defendants in his individual name, it is not competent to them to say that he was a member of a partnership, and did not contract on his own account.

(PARKE, B.: Although the money may be partnership money, yet

(1) 14 R. R. 426 (1 M. & S. 249).
(2) 60 R. R. 678 (9 M. & W. 79).
(3) 13 R. R. 347 (15 East, 7).
(4) 11 R. R. 715 (2 Camp. 308).
(5) 52 R. R. 451 (11 Ad. & El. 589).

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if one partner lends it as his own, he must sue alone, for there is no privity between the other partners and the person to whom the money is lent.)

Suppose Farquar had died, and then Cooke, a perfect stranger to the Bank, had drawn a cheque, would the bankers have been bound to honour it?

(PARKE, B.: It is not a necessary part of the contract that the bankers should honour the drafts of the two: it may be a contract with Cooke and Farquar, that the bankers should honour the drafts of Farquar only.)

The memorandum on the pass-book was merely a mode of earmarking the account. [They also cited *Alexander* v. *Barker* (1).]

Montague Smith (*Crowder* with him), in support of the rule:

The fact of the account being opened in Farquar's name is not conclusive; but it was a question for the jury, whether, in opening the account, he was not really acting as agent for the Company.

(PARKE, B.: In *Sims* v. *Bond* (2), the COURT considered that it might be shown that a banking account, though in the name of one partner, was, in truth, *the partnership account; but then it must be made out by distinct evidence.)

[*750]

The letter addressed by Farquar to the defendants, in which he speaks of "withdrawing the Company's account," was strong evidence to show that he was acting on behalf of the partnership. If the account had been overdrawn, might not the bankers have sued the Company? (He was then stopped by the COURT.)

PARKE, B.:

We think there is evidence which ought to have been submitted to the jury, that Farquar, in opening the account, was acting as agent for the partnership. The mere fact of the money being partnership property would not be sufficient, because one partner might take a portion of the partnership property, and lend it to another; but in this case there are two circumstances which did not occur in *Sims* v. *Bond:* one is, that though the account was opened in the name of Farquar, the letters "B. C. C." were in the

(1) 37 R. R. 658 (2 Cr. & J. 133). (2) 39 R. R. 511 (5 B. & Ad. 389).

pass-book. It is for the jury to decide whether by that Farquar meant to keep the account on behalf of the Coal Company, or whether those letters were a mere private memorandum. Further, the letter which Farquar wrote to the Bank is some evidence for the jury that he was acting on behalf of the Coal Company. Perhaps it would have been wise to have considered a banking account as kept only by the person in whose name it is. However, *Sims* v. *Bond* decided that the private name in the pass-book is not conclusive, as, by the usage of merchants, the name on a bill of exchange; but its only effect is to throw upon the parties suing the obligation of showing that they were the real contracting parties. The question in this case will be, whether that is made out to the satisfaction of the jury. If this had not been a deposit by a partner, but by a third person, the matter might have been set at rest, by calling that person to prove on whose account he really was lending the money to the Bank. *The difficulty is increased when [*751] the person who opens the account is not merely the agent of, but a partner in, the firm on whose behalf he opens the account.

ALDERSON, B.:

I am of the same opinion. There was a very slight case; but still there was evidence to go to the jury on the question whether Farquar, in opening the account, was really acting as agent for the partnership, or on his own behalf.

PLATT, B.:

Possibly I entertained a wrong impression; but I am still of opinion that there was no evidence for the jury. The account was opened by Farquar, but the pass-book was headed with the letters "B. C. C.," in addition to his name. That may have been for the purpose of distinguishing this Farquar from another customer of the same name. If the account was intended to be opened and carried on with the money of the partnership, the items do not correspond, and they are perfectly inconsistent with the letter written by Farquar, in which he assumes to act for the Company. Perhaps my impression, though strong, is erroneous. There ought, therefore, to be a new trial.

Rule absolute.

1848.
July 13.

[752]

DOE D. KNIGHT *v.* RICHARD SPENCER.
SAME *v.* SANSUM.

(2 Ex. 752—772.)

The General Inclosure Act, 41 Geo. III. c. 109, s. 16, authorises the Commissioners to make partition of land held in common, upon the request in writing of the tenants in common, or any or either of them. A local Act for inclosing land within the parish of M. (59 Geo. III. s. 31), enabled Commissioners to make exchanges of land with the consent of the owners, whether tenants in fee-simple or for life. Sect. 32 provided for the costs of partition; but there was no clause in terms authorising partitions. The 59 Geo. III. received the Royal assent on the 19th May, 1819, at which time C. was seised of an undivided moiety of certain land in M. for the life of K., the other moiety being vested in A. S. in fee. On the 2nd August, 1819, C. and A. S. made a claim in writing under the 41 Geo. III. c. 109, in respect of the land so held by them as tenants in common; and on the 13th September, 1819, A. S. died intestate, leaving E. S. his heir. On the 11th August, 1826, the Commissioners made their award, and thereby made certain allotments, numbered respectively on a map, 13, 87, and 88, to C. and A. S., in respect of their interests in the open lands to be allotted and divided; and they also, under the head "Exchanges," allotted to E. S. an undivided moiety of certain land sought to be recovered in this action, as also of the said three pieces of land numbered 13, 87, and 88, the other moiety being therein stated to be already vested in E. S. in exchange for, as well the undivided moiety of the said E. S. in certain other old inclosed lands, which the Commissioners thereby allotted to C., the other moiety thereof being therein stated to be then already vested in him, as also the entirety of a close belonging solely to E. S.: Held, that the local Act having, by the 32nd section, contemplated partitions, but containing no authority for that purpose, the Legislature must have intended that they should be effected under the 41 Geo. III. c. 109, s. 16; and that this allotment could not be supported as a partition under that Act; because, first, C. was only tenant *pur auter vie*, and, as such, had no authority to consent to a partition; secondly, because one of the tenants in common was to take as his share in severalty a close which, before the partition, formed no part of the land held in common, but was the separate property of the other tenant in common.

Also, that the words "tenants for life," in the 31st section of the local Act, 59 Geo. III. included "tenants *pur auter vie*," and that the allotment was good under that Act as an exchange.

Also, that two tenants in common may exchange with each other their respective moieties of different parts of the land held in common; and where the moiety of an estate is settled to uses, with a power of exchange in the trustees, such a power may be well executed by dividing the land into two portions to be held in severalty, one to the uses of the settlement, the other by the party entitled to the other moiety.

Also, that the allotments made to C. and A. S. were not void by reason of their having been made after the death of A. S., and when E. S., his heir, was entitled.

THIS was an ejectment, brought on the demise of John Knight, dated the 10th of July, 1842, to recover one undivided moiety or half part of and in a house and orchard and two meadows, in the

parish of Martock, in the county of Somerset. At the trial, before Platt, B., at the Summer Assizes for that county, in the year 1845, a verdict was found for the plaintiff, subject to the opinion of the Court on a case which stated in substance as follows:

The lessor of the plaintiff claims to be entitled under the will of Elizabeth Goodden, hereinafter set out.

By indentures of lease and release, bearing date the 15th and 16th days of May, 1758, certain tenements and lands (including the entirety of the lands, one undivided moiety *whereof is sought [*753] to be recovered in this action) were limited, after the solemnisation of a then intended marriage, which afterwards took effect, between Thomas Goodden and Ann Damer, to the use of the said Thomas Goodden for life, remainder to trustees to support contingent uses, remainder to the use of the child or children of the said intended marriage, in such shares and proportions, and for such estates and interests, as the said Thomas Goodden and Ann his intended wife, or the survivor of them, should by any deed or deeds, or by his or her last will and testament, limit or appoint; and in default of such limitation or appointment, to various uses, which did not take effect.

The said Thomas Goodden and Ann Damer were married on the 20th day of August, 1758. Thomas Goodden died before his wife, on the 12th day of October, 1779. There were issue of Thomas Goodden and Ann Damer five children. Of these children there were two only, viz. Ann and Elizabeth, who became material to the title. Ann was born on the 7th of September, 1762, was married to Thomas Knight on the 25th of November, 1783, and died in December, 1795. Elizabeth was born on the 27th of February, 1764, and died unmarried, on the 24th of February, 1787.

The said Ann Goodden (formerly Ann Damer), after the death of Thomas Goodden, her husband, by an indenture of appointment, bearing date the 8th day of March, 1784, in pursuance of the power vested in her by the hereinbefore-mentioned indentures, duly limited and appointed the lands and tenements included in those indentures, from and after the death of the said Ann Goodden, to the use of the said Ann Knight and Elizabeth Goodden, in fee, as tenants in common.

The said Elizabeth Goodden died before her mother, on the 24th of February, 1787, seised by virtue of the before-mentioned appointment of the reversion in fee, expectant on the death of her mother, of and in one undivided moiety *of the said tenements and lands [*754]

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mentioned in the above-mentioned indentures. The said Elizabeth Goodden being so seised made a will, dated the 11th of December, 1786, under which the lessor of the plaintiff now claims title. The material parts of this will, which was duly executed and attested to pass real estate, were as follows: "I give and devise all and singular the messuages, tenements, lands, and hereditaments which I am seised of or entitled unto, either in possession, reversion, remainder, or expectancy, situate, lying, and being within the parish of Martock, or elsewhere in the county of Somerset, unto my brother-in-law, and sister, Ann Knight, his wife, of Bower Hinton, yeoman, for and during the term of their natural lives; and from and after their decease, I give and devise the same unto my nephew, John Goodden Knight, son of my said brother-in-law and sister, Ann Knight, his heirs and assigns for ever. But in case the said John Goodden Knight should not survive my said brother-in-law and sister, Thomas and Ann Knight, and should die without an heir lawfully begotten, then and in such case I give and devise the same to the next heir of the said Thomas and Ann Knight, my brother-in-law and sister as aforesaid, their heirs and assigns, for ever."

The said Ann Goodden, the mother of the testatrix, died in September, 1793. John Goodden Knight, mentioned in the said will, died shortly after the testatrix, viz. in June, 1787, without issue; in fact, he was then a child not a year old. Soon after the death of this son, another son of the said Thomas and Ann Knight was born, who was also called John Goodden. This last John Goodden Knight was born in November, 1787. On the 3rd of November, 1811, he married Mary Welch; he died in June, 1823; Mary, his wife, died in June, 1833. The lessor of the plaintiff is the eldest son of the marriage of the said last-mentioned John Goodden Knight and Mary his wife.

[*755] The said Thomas Knight, and Ann his wife are both *dead. The said Ann, the wife, died in December, 1795, and the said Thomas Knight died in June, 1842.

The case then set out indentures of lease and release, bearing date the 1st and 2nd of July, 1814, between Thomas Knight, described as surviving devisee for life, and the second-named John Goodden Knight, described as reversionary devisee in fee under the will of Elizabeth Goodden (and certain parties, mortgagees and trustees), whereby the undivided moiety of the lands and tenements included in the indentures of the 15th and 16th of May, 1758,

vested in Robert Chaffey and William Chaffey, during the life of Thomas Knight.

In the 59 Geo. III., an Act was passed, intituled, "An Act for inclosing lands within the parishes of Martock and Muchelney, in the county of Somerset."

On the 14th of August, 1826, the Commissioners acting under the above-mentioned Act made their award in writing under their hands and seals, whereby, after reciting (*inter alia*) the above-mentioned Act, wherein is recited the 41 Geo. III., intituled, "An Act for consolidating in one Act certain provisions usually inserted in Acts of Inclosure, and for facilitating the mode of proving the several facts usually required on the passing of such Acts," the Commissioners awarded (so far as material to the present question) as follows:

"We do hereby set out, allot, and award all and every part and parts of the open and common arable fields and lands and common meadows in the said parish of Martock, unto and between the several proprietors of and persons interested in the same respectively, according to the extent and value of their respective lands, rights, and interests therein before the passing of the first recited Act, in the manner directed by such Act; (that is to say), *inter alia*, unto Robert Chaffey, William Chaffey, and Arthur Spencer, one piece or parcel of meadow-land, containing by admeasurement one acre, two roods, and three perches, lying in *Hinton Mead, [*756] numbered 13 on Hinton Mead map, in lieu of and satisfaction for the lands, rights, and interests of the said Robert Chaffey, William Chaffey, and Arthur Spencer, in the said meadow called Hinton Mead, the entirety of which said piece of land last hereinbefore allotted is hereinafter vested in the said Arthur Spencer, by an exchange hereinafter contained. And we, the said Commissioners, do hereby set out, allot, and award all the residue and remainder of the said open and commonable pastures respectively, called Whetmoor, Lowsham, and Case, unto, for, and amongst all and every the owners and proprietors and persons claiming and being allowed rights of common thereon respectively, in the manner and under the directions and regulations of the said first recited Act; (that is to say), (allotments in Whetmoor to the proprietors of tenements in the parish of Martock;) unto Robert Chaffey, and William Chaffey, and Arthur Spencer, one piece or parcel of land, containing by admeasurement &c., numbered 87 on the same map, in respect of the said Robert Chaffey's, William Chaffey's and Arthur

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Spencer's freehold tenement, called Dames; and one other piece or parcel of land, containing by admeasurement &c., numbered 88 on the same map, in respect of the said Robert Chaffey's, William Chaffey's, and Arthur Spencer's freehold tenement, called Blind Lane."

And in the said award there is also contained, under the head "Exchanges," as follows:

"Also we, the said Commissioners, in further pursuance and by virtue of the power and authority to us given in and by the said recited Act of Parliament, do hereby set out, allot, and award the several lands, new allotments, and old inclosures, situate within the several parishes of Martock and Muchelney, and hereinafter particularly described, in lieu of and exchange for each other, unto the several persons respectively hereinafter named, and in such [*757] manner as is hereinafter expressed concerning the *same, such exchanges having been made with the consent of the respective owners, proprietors, and other persons seised of the lands, hereditaments, and premises so respectively exchanged, such consent having been testified by writing under their respective hands; (that is to say), unto the said Edward Spencer one undivided moiety of several tenements and closes of land hereinafter described, the other undivided moiety being already vested in the said Edward Spencer; (that is to say), the capital messuage or dwelling-house, with the outhouses, garden, and orchard thereto belonging, containing by admeasurement &c.; three closes of meadow, called Old Leazes, containing by admeasurement &c.; a piece or parcel of land, numbered 13, on Hinton Mead map, containing by admeasurement &c.; and two pieces or parcels of land, numbered respectively 87 and 88, on Whetmoor map aforesaid, containing together by admeasurement &c.; which said last mentioned three pieces of land are hereinbefore allotted and awarded to the said Edward Spencer and Robert and William Chaffey, in exchange of and for the moiety and lands next hereinafter allotted and awarded to the said Robert and William Chaffey; unto the said Robert Chaffey and William Chaffey, the undivided moiety of him the said Edward Spencer of and in the several tenements and closes of land hereinafter described (the other undivided moiety of the same being already vested in the said Robert Chaffey and William Chaffey); (that is to say), a messuage or dwelling-house called Blind Lane House, with the outhouses, out-buildings, garden, and orchard thereto belonging; two closes of meadow, called Mill closes; a close of arable, called

Dyed Way; a close of arable, called Great Buckland; a close of arable, called Little Buckland; an orchard and garden, called Saunders's; and also the entirety of a close of arable land, called Trott's Acre, in exchange for the said moiety last hereinbefore allotted to the said Edward Spencer."

[758]

The said capital messuage or dwelling-house, with the outhouses, garden, and orchard thereto belonging, and two of the said three closes of meadow, called Old Leazes, are the premises in respect of which this action has been brought. The said close, called Trott's, formed no part of the tenements contained in the previous title set out in this case.

The said Robert Chaffey and William Chaffey were in possession of the undivided moiety conveyed by the lease and release of the 1st and 2nd of July, 1814, from that time until the said award.

By indentures of lease and release, dated the 1st and 2nd of February, 1800, the undivided moiety which was appointed to Ann Knight, as hereinbefore mentioned, became and was vested in Arthur Spencer in fee simple.

The said Arthur Spencer, together with the said Robert Chaffey and William Chaffey, on the 2nd day of August, 1819, made a claim, which was delivered to the clerk to the Commissioners acting in the execution of the said Inclosure Act, and thereby claimed to be interested in the lands intended to be divided, allotted, and inclosed under the said Act, in respect of the entirety of the lands, one moiety whereof is sought to be recovered in this ejectment.

The said Arthur Spencer died on the 13th of September, 1819, intestate as to his real estate, leaving Edward Spencer, his nephew and heir-at-law, him surviving; and the said Edward Spencer died intestate on the 8th of May, 1831, and was at the time of the said award seised in fee of the said undivided moiety, which was appointed as aforesaid to the said Ann Knight.

The said Edward Spencer, and those claiming under the said Edward Spencer, down to and including the defendant, have held possession of the whole of the premises awarded to them, from the date of the said award to the present time.

The lessor of the plaintiff claims to be entitled to the undivided moiety sought to be recovered in this action, *under the said will [*759] of the said Elizabeth Goodden, notwithstanding the said indentures of lease and release of the 1st and 2nd of July, 1814, and notwithstanding the said proceedings under the Inclosure Act. The

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defendant will contend, that, even if the lessor of the plaintiff shows title under the will, he cannot, upon the facts disclosed in the case, maintain ejectment for the undivided moiety of the said premises.

If the Court shall be of opinion that the plaintiff is entitled to recover, the verdict entered for him is to stand; otherwise the verdict is to be entered for the defendant.

Humphry, for the plaintiff. * * *

[763] *Barstow*, for the defendant. * * *

[764] *Humphry* replied.

Cur. adv. vult.

The case of *Doe* d. *Knight* v. *Sansum*, in which precisely the same question arose, was argued in Easter Term last (May 8), by

Humphry, for the plaintiff. * * *

Butt, for the defendant. * * *

Humphry replied.

Cur. adv. vult.

The judgment of the COURT was now delivered by

ROLFE, B.:

This was an ejectment brought to recover an undivided moiety of a house and orchard, and of two meadows, in the parish of Martock, forming part of the property devised by the will of Elizabeth Goodden, dated in 1786. The case of *Doe* d. *Knight* v. *Chaffey* (1) decided that the present lessor of the plaintiff is the [*765] person who, on the death, *in 1842, of Thomas Knight, the tenant for life under Elizabeth Goodden's will, became entitled to the property thereby devised, and he is therefore entitled to recover in this action, unless by some intermediate transaction his title has been defeated. The defendant contends, that the plaintiff's title was destroyed by the effect of the Martock Inclosure Act, and the award made in pursuance of it, whereby the moiety of the house, orchard, and meadows, the subject of this action, was allotted and awarded to Edward Spencer, in lieu and exchange for other property, which, by the same award, was allotted and awarded to Robert Chaffey and William Chaffey, the parties then entitled, by virtue of a conveyance from Thomas Knight, of his life interest

(1) 73 R. R. 677 (16 M. & W. 656).

under Elizabeth Goodden's will. If this allotment to Spencer was valid, the title of the lessor of the plaintiff to the moiety now in question was defeated.

The Inclosure Act received the Royal assent on the 19th May, 1819, at which time the moiety of the property devised by the will of Elizabeth Goodden was vested in Messrs. Chaffey, for the life of Thomas Knight, the other moiety being vested in Arthur Spencer, in fee. This property consisted partly of messuages and old inclosures, and partly of open land in the parish of Martock. On the 2nd August, 1819, Messrs. Chaffey and Arthur Spencer duly made a claim in writing, under the Inclosure Act, in respect to the open land to which they were thus entitled as tenants in common; and on the 13th September, 1819, Arthur Spencer died intestate, leaving Edward Spencer his heir.

On the 11th August, 1826, the Commissioners under the Inclosure Act made their award, and thereby made certain allotments, numbered respectively on the map 13, 87, and 88, to Messrs. Chaffey and Arthur Spencer, in respect of their interests in the open lands, to be allotted and divided; and they also, under the head of "Exchanges," allotted to Edward Spencer (*inter alia*) an undivided moiety, as well of a messuage, orchard, and meadows therein described, (being the messuage, orchard, and meadows, the moiety of *which is sought to be recovered in this action), as also of the [*766] said three pieces of land numbered 13, 87, and 88, the other moiety being therein stated to be then already vested in the said Edward Spencer, in exchange for, as well the undivided moiety of the said Edward Spencer in certain other old inclosed lands in the said parish, which the said Commissioners thereby allotted to the said Messrs. Chaffey, the other moiety thereof being therein stated to be then already vested in them, as also the entirety of a close called Trott's close, belonging solely to Spencer. If this award was effectual to pass the moiety of the messuage, orchard, and meadows in question to Edward Spencer, then the present lessor of the plaintiff is barred, and he cannot recover.

It was however objected, that this allotment, though described in the award as an exchange, was in truth not an exchange, but a partition, and that the Act, though it authorises exchanges, does not authorise partitions.

It is true that there is no clause in the Act authorising partitions, though there is a clause, namely, s. 31, authorising exchanges, if made with the consent of the owners, the section

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in substance defining who are, for the purpose of such consent, to be considered owners. But although the local Act does not in terms authorise partitions, yet it certainly contemplates their being made, for, in section 32, express provision is made for the costs attending them.

The Legislature, therefore, contemplating the making partitions, but having given no express authority for that purpose in the local Act, must have intended that they should be effected, when necessary or expedient, under the provisions of the General Inclosure Act, 41 Geo. III. c. 109. The 16th section of that Act is as follows: (His Lordship read the section.)

This section, it will be observed, authorises the Commissioners to [*767] make partition of land held in common, upon *the request in writing of the tenants in common, or any or either of them. Now, in this case, Edward Spencer was, at the date of the award, seised in fee of one moiety of the messuage, orchard, and meadows, as tenant in common with the parties entitled under Elizabeth Goodden's will to the other moiety; and under the award, he in like manner became entitled, as heir of Arthur Spencer, to a moiety of the new allotments made to the Messrs. Chaffey and to Arthur Spencer, in respect of their interests in the lands to be divided and inclosed. Such being the interests of the different parties, the Commissioners have allotted a moiety of part of the property so held in common to Edward Spencer, and the moiety of the other part to the Messrs. Chaffey, as the parties in possession of the moiety derived from Elizabeth Goodden's will.

On the part of the plaintiff, it was contended, that this allotment, though described as an exchange, was in truth a partition, and, as such, invalid, for want of a due compliance with the General Inclosure Act.

We are all clearly of opinion, that, as a partition, it cannot be supported.

On referring to the 16th section of the General Inclosure Act, it appears that the Commissioners have authority to make partition, at the request, in writing, of the tenants in common, or any or either of them. It is not necessary, as in case of exchanges, that there should be the consent of both parties. The Commissioner is authorised to make partition at the request of any one of the tenants in common; and this distinction is founded on very good grounds. Putting the Inclosure Act out of the question, no exchange could be made without the concurrence of both the exchanging parties;

whereas any one tenant in common can compel a partition. And it is very reasonable, therefore, that a similar distinction should exist in respect of the powers given to a Commissioner of Inclosure. As to exchanges, he has only power to sanction what the parties do for themselves. As to partitions, he has power, at the *instance of [*768] any one party interested, to bind all the rest. Now, in this case, Edward Spencer was one of the tenants in common, being entitled to his moiety in fee simple. There can be no doubt, therefore, but that, on his written request, the Commissioners would have had authority to make a valid partition, which would have been binding on the other tenants in common. But there was no such request; there was a written consent to the allotment in exchange, after it had been made; but this is not what the 16th section of the General Inclosure Act contemplates, and the difference is one, not of form, but of substance. The meaning of the Legislature was, that, at the request of one of several tenants in common, the Commissioner should have power to make what he should consider a fair partition. He was intended to exercise his judgment. His decision was to bind the other parties, whether they consented or not, and whatever might be the extent of their interests. Now, nothing of this sort was done here. The Commissioners do not profess, by their award, to have exercised any skill or judgment of their own in the division of the estate. The partition, if valid, must be so by the act, not of the Commissioners, but of the parties by whose consent it was made; and certainly there was no consent of the parties entitled to the moiety not belonging to Spencer, except of Messrs. Chaffey, who were only tenants *pur autre vie*, and as such had no authority by the Act to consent to a partition. This is a fatal objection to any partition the validity of which is to depend on the 16th section of the General Inclosure Act. But there is another ground of objection equally conclusive, if the allotment is to be considered merely as a partition; and that is, that one of the tenants in common is to take as his share in severalty a close of land, which, previous to the partition, formed no part of the land held in common, but was the separate property of the other tenant in common. This cannot be done on a mere partition. The allotment being, therefore, on both these grounds, bad as a partition, *it remains to consider whether [*769] it is good as an exchange.

The local Act, sect. 31, authorises the Commissioner to allot and award any lands or hereditaments in exchange for any other lands or hereditaments, provided such exchange be with the

DOE d. KNIGHT v. SPENCER.

consent of the owners, whether as tenants in fee simple or for life (1).

Now, here the allotments in severalty were made with the consent of Spencer, the owner in fee of one moiety, and of Messrs. Chaffey, tenants *pur autre vie*, (that is, for the life of Thomas Knight,) of the other. We think that the words of the statute, "tenants for life," include tenants *pur autre vie*, and so that Messrs. Chaffey were enabled to give a valid consent to an exchange; and the only question, therefore, is, whether the transaction can be sustained, as coming within the description of what the Act contemplated under the denomination of an exchange.

We think it may.

It certainly cannot be laid down, that in every case a partition can be effected by means of an exchange. It is essential to an exchange, properly so called, that it should be made between two parties only. "The things given and taken in exchange run in parallel lines, and cannot pass into three lines or a triangle:" per CURIAM, in *Etonboll* v. *Bishop of Winchester* (2). So that, in no case

(1) Sections 31 and 32 were as follows: Sect. 31, "that it shall be lawful for the said Commissioners to set out, allot, and award any lands, tenements, or hereditaments, within the said several parishes of Martock and Muchelney, or either of them, in lieu of or in exchange for any other lands, tenements, or hereditaments within the same parishes respectively, of either of them, or within any adjoining parish, township, or place, provided that all such exchanges be ascertained, specified, and declared in the award of the said Commissioners, and be made with the consent of the owner or owners, proprietor or proprietors of the said lands, tenements, and hereditaments, whether such owner or owners, proprietor or proprietors, shall be a body or bodies politic, corporate, or collegiate, or a tenant or tenants in fee simple or for life, or in fee tail general or special, or by the courtesy of England, or for years determinable on any life or lives, by and with the consent of the lessor or lessors, but not otherwise, or with the consent of the guardians, trustees, feoffees for charitable or other uses, husbands, committees, or attornies of or acting for any such proprietors or owners as aforesaid, who at the time of making such exchange or exchanges shall be respectively infants, *feme covert*, lunatics, or under any other legal disability, or who shall be beyond the seas, or otherwise disabled to act for themselves, himself or themselves, such consent to be testified in writing, under the common seal of the body politic, corporate, or collegiate, and under the hands of the other consenting parties respectively; and all and every exchange and exchanges so to be made shall be good, valid, and effectual in the law, to all intents and purposes whatsoever."

Sect. 32, "that all costs, charges, and expenses attending the making of any exchanges or partitions by virtue of this or the said recited Act, shall be paid, borne, and defrayed by the several persons making such exchanges and partitions, in such manner and in such proportions as the said Commissioners shall by their award order and direct."

(2) 3 Wils. 497.

of three or more coparceners or tenants in common, can a partition be made by means of an exchange. But, if A. and B. be tenants in common of Blackacre and Whiteacre, we can discover no principle which is to prevent A. from giving his moiety of Blackacre to B., in exchange for B.'s moiety of Whiteacre. In such a transaction all the requisites of a valid exchange are found, and the only old authority against its validity is a passage in the Touchstone (1), in which it is said that joint tenants, tenants in common, and coparceners, cannot exchange the lands they *so hold with one another, before they have made partition. No reason is given for this proposition, and it is certainly not borne out by the passages in Perkins, to which reference is there made. Indeed, it may be doubted whether these passages are referred to as authorities for the doctrine in question; and in no other old authority have we been able to discover any warrant for what is laid down in the Touchstone. Mr. Preston, in his edition of the Touchstone, expresses an opinion that the position is wrong, for he asks, what objection is there to an exchange of one undivided moiety of part of the lands for an undivided moiety of other parts of the same lands, as between coparceners and tenants in common? though, as between joint tenants, the unity of their seisin may prevent the operation of an exchange. The case of *M'Queen* v. *Farquhar* (2), relied on by the plaintiff's counsel, in argument, certainly shows Lord ELDON'S opinion to have been, that a power of exchange in a settlement to be effected under the Statute of Uses, would not authorise a partition. And it seems, from Mr. Bell's note to *Abel* v. *Heathcote* (3), that Lord ELDON retained this opinion in the year 1820.

[*770]

As a general proposition, it may be true that a power of exchange does not necessarily include a power to make partition in all cases: where, for instance, the partition is to be made among three or more parties, as was the case in *Abel* v. *Heathcote;* but it does not surely follow from thence, that, where there are only two parties, the exchange of a moiety of one part of the land held in common, for a moiety of the other, is to be considered bad, because it effectuates a partition. If we are right in holding, (contrary to what is said in the Touchstone,) that, at common law, two tenants in common may exchange with each other their respective moieties of the different parts of the land held in common, it must follow,

(1) P. 292.
(2) 8 R. R. 212 (11 Ves. 475).
(3) 2 R. R. 171 (4 Br. C. C. 277).

Doe d. Knight v. Spencer. [*771]

where the *moiety of an estate is settled to uses, with a power of exchange in the trustees, that such a power may be well executed by dividing the lands into two portions to be held in severalty, one on the uses of the settlement, the other by the party entitled to the other moiety. If such a transaction would have been valid as the execution of a power under the Statute of Uses, *à multo fortiori* will it be good under the statutory power contained in this Act of Parliament, the main and paramount object of which, as in all similar Acts, was to enable the Commissioners to make such a division and distribution of the lands in the parish as should best conduce to the future convenient enjoyment of the whole.

A point was made in argument, that the allotments made to Messrs. Chaffey and Arthur Spencer, in respect of their interests in the open land, were void, having been made after the death of Arthur, and when Edward his heir was the party entitled; but there is no weight in this, for it appears on the face of the award, that, though the allotment was made in the name of Arthur, who had sent in the claim, yet the Commissioners understood the effect of it to be the same as if they had used the name of Edward. For, in the subsequent part of the award, as to the exchanges, they describe Arthur's moiety of the three allotments as being vested in Edward, which could only be because he took under the award in favour of Arthur.

In fact, the use of the name "Arthur" evidently arose from his having been the party who concurred with Messrs. Chaffey in making the claim, and is altogether immaterial as affecting the title.

On the whole, therefore, we are of opinion that the award correctly describes the allotments in question as an exchange and not a partition; and that, for the reasons we have already given, the exchange is perfectly valid, and so that the title of the lessor of the plaintiff was effectual. There must, therefore, be judgment for the defendant.

[772] In *Doe* d. *Knight* v. *Sansum* and others, the question is precisely the same, and in that case also our judgment must be for the defendant.

Judgment for the defendant.

STEVENS *v.* KEATING.

1848.
Jan. 13.
May 31.

(2 Ex. 772—778; S. C. 19 L. J. Ex. 57.)

[772]

The specification of a patent for "a process or method of combining various materials so as to form stuccoes, plasters, and cements, and for the manufacture of artificial stones, marbles, &c., used in buildings," after stating the invention to consist in producing certain hard cements of the combination of the powder of gypsum, powder of limestone, and chalk, with other materials, such combinations being (subsequent to their mixing) submitted to heat, described the method or process of making a cement from gypsum, to consist in mixing with powdered gypsum strong alkali (*ex. gr.* best American pearlash) dissolved in a certain proportion of water, this solution to be neutralised with acid (sulphuric acid being the best), the mass to be kept in agitation, and the acid to be added gradually till the effervescence should cease; and then a certain proportion of water to be added (if other alkali were used, the quantity to be varied in proportion to its strength); and the mixture having been brought to a proper consistence by the further addition of powdered gypsum, to be dried in moulds, and finally subjected to a furnace capable of producing a red heat. The description of making the cement differed little from that of the preceding process.

The specification, after proceeding to state the mode of using the cement so made, concluded by stating, that other alkalies and acids besides those before mentioned would answer the purposes of the invention, though not so well, and that the inventor claimed the method or process thereinbefore described: Held, that the specification was bad; for that either the inventor claimed all acids and alkalies, or only those which would answer the purpose; in the former of which cases, as some acids and alkalies would not answer the purposes of the invention, the specification was therefore bad; and in the latter, it was bad for not specifying those acids and alkalies which would be found to succeed.

CASE for the infringement of two patents, to which the plaintiff was entitled as the assignee of one Martin. The declaration contained two counts, one on each patent. The defendant pleaded to the first count, fourthly, that the said invention was not duly specified; to which the plaintiff replied in the usual form, and upon that replication issue was joined. At the trial of the cause, before Pollock, C. B., at the Middlesex sittings after last Michaelmas Term, the plaintiff had a verdict on all the issues, with the exception of the fourth, upon which a verdict was entered for the defendant, under the direction of the LORD CHIEF BARON, who was of opinion that the specification upon which the first count was framed was bad in point of law, leave being reserved to the plaintiff to move to enter a verdict upon that issue *also, with nominal damages, if the Court should think otherwise.

[*773]

The *Attorney-General*, in Hilary Term last (January 13), moved accordingly.

Cur. adv. vult.

STEVENS v. KEATING.

The pleadings and the nature of the question sufficiently appear from the judgment of the COURT, which was now (May 31) delivered by

POLLOCK, C.B.:

This was an action for infringing two patents granted to one Richard Freen Martin. The first was dated the 8th of October, 1834, and was for "a certain process or processes, method or methods, of combining various materials, so as to form stuccoes, plasters, or cements, and for the manufacture of artificial stones, marbles, and other like substances used for buildings, decorations, or other similar purposes."

The second was dated the 2nd of June, 1840, and was for "certain improvements in the manufacture of certain descriptions of cement;" being, in fact, an improvement on the first patent. Both the patents were assigned to the plaintiff on the 9th of December, 1843.

The declaration was in the usual form, the first count being on the first patent, the second on the second.

The defendant pleaded, first, Not guilty; secondly, that Richard Freen Martin was not the true inventor of the invention in the first count mentioned; thirdly, that the invention in the first count was not a new invention; fourthly, that the said invention was not specified; fifthly, that it was not an invention for a new manufacture for which letters-patent could be granted. The sixth, seventh, eighth, and ninth pleas were pleaded to the second count, and were similar to the second, third, fourth, and fifth pleas to the first count. To these pleas there was the usual replication. At
[*774] the trial, the patents, the specification, and *the assignments were proved, but the second count was given up, and no evidence was offered of any infringement of the second patent. The important part of the first specification was as follows:

"My invention consists in producing certain hard cements of combinations of the powder of gypsum, of powder of limestone, and of the powder of chalk, with other matters or materials; such combinations, when produced according to my invention, being (subsequently to their mixing) submitted to the action of heat, as will be hereafter fully described, whereby cement so produced will become highly useful as stucco or plaster, and for manufacturing of artificial stones, marble, and other like substances used in buildings, decorations, or similar purposes. In order that my invention may be fully

described and carried into effect, I will proceed to describe the methods or processes which I have pursued and found to answer, and are the best I am acquainted with. First, for a cement from gypsum, I take any quantity of gypsum, which I reduce to a fine powder, either by grinding or by the ordinary methods pursued for the manufacture of plaster of paris of commerce; or I take any quantity of moulds, or other articles which have been formed of plaster of paris, and reduce them by the action of heat and grinding or crushing (or only grinding or crushing) into fine powders, similar to plaster of paris. With the above described plaster of paris I mix a solution of the following matters or materials: Dissolve one pound of strong alkali (for instance, best American pearlash) in one gallon of water; this solution is to be neutralised with acid (sulphuric acid is best for the purpose), keeping the solution in agitation, and adding the acid gradually until effervescence ceases; then add the additional quantity of seven gallons of water, making in the whole eight gallons (if other alkali is used, then the quantity must be varied in proportion to its strength), which are to be mixed with a quantity of the powder till the same is of a consistence or state suitable to be cast or *moulded, as the [*775] case may be, into cakes, bricks, or other forms, which are to be permitted to dry, and then submitted to such degrees of heat in reverberatory furnaces, kilns, iron retorts, such as are used in gas-works, or such other means as will bring them to a red heat throughout; if the above materials be not heated red throughout, such parts as are not sufficiently burned will be ultimately less hard and durable than the cement properly burned. The solution necessary for admixture is about half the measure of the powder so treated. Secondly, for a cement from lime-stones and chalk, I take any quantity of lime-stone or chalk, which I grind or subject to the usual process of burning or calcination to lime; and, if by the latter process, reduce this lime to powder, either by exposure to air or by the application of water, in the ordinary way in which limes are slacked (air slacking is best), and treat it with solution of alkali and sulphuric acid in the manner described for plaster of paris; but, as it requires less fluid for admixture, the solution must be proportionably stronger. Dissolve one pound of alkali (best American pearlash) in one gallon of water, which neutralise with sulphuric acid in the manner described for plaster of paris; then add the additional quantity of four gallons and two quarts of water, making in the whole five gallons and two quarts. Work up the

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solution with the powdered lime into cakes, and, when dry, burn them after the method directed for gypsum cement. The solution necessary for admixture is about one-third of the measure of lime powder so treated; if powder of gypsum, or powder of lime-stones, or chalk, are used uncalcined, then calcination must be made as regards the strength of the liquid in reference to the less quantity required for the purpose. The solution of alkali, without the addition of the acid, may be used for the manufacture of a cement from powder of gypsum, provided the subsequent burning be adopted, but which cement will not be so good as those made by [*776] the other methods described. *Cements may also be made from the powder of lime-stones and chalk with the solution of acid—say, one quarter of a pound of sulphuric acid dissolved in four gallons of water, and afterwards burned as before described; but cements so made will not be so good as those made by the other methods described. The processes of incorporation and burning, both for this and alkali cement from gypsum, are the same as previously described." After describing the manner in which the cement is to be used, the specification concludes: "And whereas other alkalies and acids, besides those hereinbefore mentioned, will answer the purposes of my said invention, though none that I have tried have answered so well as the alkali and acid hereinbefore set forth; and whereas I claim as my invention the processes of mixing the powdered materials, alkalies, and acids, as hereinbefore described, and subsequently burning, heating, or calcining the same, for the purposes hereinbefore set forth, &c., I do declare this to be my specification," &c.

Evidence was given of the utility of the plaintiff's invention, and that the defendant used borax, which is a salt—the combination of an acid with an alkali—in making his cements: this, it was contended, was an infringement of the first patent, borax being composed of an acid and an alkali. At the close of the plaintiff's case, it was contended, first, that there was no evidence of any infringement of the patent at all; secondly, that the specification of the first patent was bad in point of law. As to the first point, leave was reserved to enter a verdict for the defendant on the issue of Not guilty to the first count, if the Court should be of opinion that there was no evidence of infringement of the first patent by the defendant. The second point was fully argued. At the conclusion of the argument, I decided that the first specification was bad in point of law, and directed the jury to find for the defendant upon the issue to the fourth plea. In the ensuing Term, *the *Attorney-*

General moved for a new trial, and we have now to decide whether the specification to the first patent is good in point of law or not.

The title of the patent is for "A process or processes, method or methods, of combining various materials, so as to form stuccoes, plaster, or cements, and for the manufacture of artificial stones, marbles, and other like substances."

The specification states the invention to consist in producing certain hard cements of the combination of the powder of gypsum, powder of lime-stone, and chalk, with other materials, such combinations being (subsequent to the mixing) submitted to heat. The specification then states the method of making cement from gypsum, in the course of which alkali is to be used, and is to be neutralised with acid (it is stated sulphuric acid is best for the purpose); the result is to be subjected to some furnace, which will produce a red heat. The method of making cement from lime-stones and chalk is then described, which does not materially differ from the other process—which seems to consist in the use of acid afterwards neutralised by alkali, and subjected to heat. The specification then states the mode of using the cement, and concludes as usual with the claim as "above stated;" and the question is, whether this is a good specification. It is the same question as if the plea had been merely the general issue under the old mode of pleading, and the question had been, whether the plaintiff was entitled to succeed. The question is, whether the specification be good or not: only one alkali (potash) and one acid (sulphuric) are mentioned in the specification; but manifestly the inventor does not confine himself to these; if he did, the defendant would be entitled to a verdict on the plea of not guilty, for he has used neither. To what extent, then, does the claim of the plaintiff go beyond the alkali and acid named? It must either be a claim of all acids and alkalies, or of all acids and alkalies that will answer the purpose. If it be a *claim of all acids and alkalies, it is clearly bad, as there are [*778] some that will not answer the purpose. If it be a claim of those only which will answer the purpose, it is as clearly bad, in consequence of not stating those which will answer the purpose, and distinguishing them from those that will not, and so preventing the public from being under the necessity of making experiments to ascertain which of them will succeed and which will not; and this was expressly so determined by the Court of Queen's Bench, in *Rex* v. *Wheeler* (1), where they say, that a specification, which casts upon the public

(1) 2 B. & Ald. 35, *n*.

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the expense and labour of experiment and trial, is bad. In any view, therefore, this specification is defective, and we think there ought to be no rule.

Rule refused.

1848.
June 21.

[778]

HORSFALL *v.* THOMAS HEY.

(2 Ex. 778—782; S. C. 17 L. J. Ex. 266.)

"Memorandum, that T. has sold to G. all the goods, stock-in-trade, and fixtures in a certain shop:" Held, to require an *ad valorem* stamp as a conveyance.

Any instrument which operates as a record of the transfer of property is a conveyance within the Stamp Act (1).

TROVER for goods, chattels, and effects. Pleas, Not guilty and not possessed.

At the trial, before Alderson, B., at the York Spring Assizes, 1848, it appeared that the conversion relied on was a sale of the effects in question; and, in order to prove it, the plaintiff gave in evidence the following document: "Memorandum.—That Mr. Thomas Hey has sold to G. Hey all the goods, stock-in-trade, and fixtures in the shop of Walter Hey, at &c., for 90*l.*" This document was signed by both parties, and bore an agreement stamp. It was objected, on behalf of the defendant, that the document operated as a conveyance, and ought, therefore, to have borne an *ad valorem* stamp of 1*l.* 10*s.* The learned Judge directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a nonsuit. A rule *nisi* having been obtained accordingly,

[779]

Knowles showed cause:

The instrument in question is in no sense a conveyance, but a mere memorandum of a past transaction. In order to come under the head "Conveyance," in the schedule of the Stamp Act, 55 Geo. III. c. 184, the instrument must purport on the face of it to convey. That Act imposes a duty "for and in respect of the principal or only deed, instrument, or writing, whereby the lands or other things sold shall be granted, leased, assigned, &c., or otherwise conveyed to or vested in the purchaser." Unless, therefore, the terms of the instrument are such that *eo instanti*, upon and by force of its execution, the property is divested from the one party and vested in the other, it is not a conveyance within that Act. Here the sale and purchase might have taken place by oral

(1) 55 Geo. III. c. 184. See now s. 54 of the Stamp Act, 1891 (54 & 55 Vict. c. 39).—J. G. P.

agreement; and if this instrument be held to be a conveyance, no agreement for the sale of goods, wares, and merchandise, would be within the exemption of the Stamp Act. If the word "fixtures" had not been introduced, there could have been no doubt upon the subject; but the question, whether certain terms do or do not amount to a conveyance, cannot depend upon the subject-matter in respect of which the parties are dealing. Besides, the word "fixtures" does not necessarily mean something attached to the freehold, but it may designate goods to be afterwards fixed. If, however, the term be construed in its strict sense as something fixed to and in contemplation of law part of the freehold, this instrument could not operate otherwise than as an agreement, since it is not under seal, and, therefore, incapable of passing the legal estate in the freehold.

(PARKE, B.: How, if that were the case, would a sheriff be justified in seizing fixtures? It is correctly laid down, in "Amos on Fixtures" (1), that, "for the benefit of creditors, fixtures are considered to be so far in the nature of personal chattels, that in certain cases they may be seized *and removed under a writ of *fieri facias*." [*780]

This instrument does not show any intention in the parties to pass the property by it. [He cited *Wick* v. *Hodgson* (2), *Pitt* v. *Shew* (3) and *Thompson* v. *Pettitt* (4).]

Martin, in support of the rule:

According to the argument on the other side, the stamp duty on conveyances might be avoided by using language in the past tense. The word "memorandum" at the commencement does not render the instrument the less a conveyance, but means simply, "let it be recorded." In *Jones* v. *Ryder* (5), PARKE, B., says, "that every instrument ought to be stamped according to its legal effect." This instrument comes within the definition of a bargain and sale; for it is an agreement whereby one person, for a valuable consideration, transfers effects to another. "The very words bargain and sell are not necessary to a good bargain and sale:" (Shep. Touchst. c. 10, p. 222); and in Co. Litt. 301 b it is said, "And he to whom such a deed, comprehending *dedi* &c. is made,

(1) P. 321, 2nd ed.
(2) 12 Moore, 213.
(3) 4 B. & Ald. 206.
(4) 10 Q. B. 101.
(5) 4 M. & W. 35.

HORSFALL v. HEY.

may plead it as a grant, as a release, or as a confirmation, at his election." (He was then stopped by the COURT.)

PARKE, B.:

The question is, whether this instrument operates as a conveyance within the meaning of the Stamp Act, 55 Geo. III. c. 184. The schedule of that Act prescribes an *ad valorem* duty on every "conveyance, whether grant, disposition, lease, assignment, transfer, release, renunciation, or of any other kind or description
[*781] whatsoever, upon *sale of any lands, tenements, rents, annuities, or other property, real or personal, heritable or moveable, or of any right, title, interest, or claim in, to, out of, or upon any lands, tenements, rents, annuities, or other property, (that is to say), for or in respect of the principal or only deed, instrument, or other writing, whereby the lands or other things sold shall be granted, leased, assigned, transferred, released, renounced, or otherwise conveyed to or vested in the purchaser." Those are very comprehensive words, embracing not only a transfer of all kinds, but every right of property. This instrument contains words in the past tense, but that can make no difference, if the instrument itself operates as a conveyance. It is laid down in Sheppard's Touchstone (which is the language of Mr. Justice DODDERIDGE, and entitled to the utmost respect as one of the first authorities in the law), "that the best way in grants is to grant by words in the present tense, as well as in the preterperfect tense; but a grant by words of the preterperfect tense only, as by *dedi et concessi* only, without words of the present tense, is good." Therefore, if this instrument is meant to be a record of a transfer, it is a conveyance and transfer of property within the meaning of the statute. It has been ingeniously argued, that, if we adopt that construction, and hold this instrument to operate as an immediate conveyance of the property, no agreement for the sale of goods, wares, and merchandise, would be within the exemption of the Stamp Act. That made me pause, because, if it were so, all bought and sold notes would require to be stamped, and that would create great confusion in the mercantile world. The result, however, would not be as contended. Under the head "Agreement," there is an exemption, not merely from the preceding stamp duty, but from all other stamp duty, of any "memorandum, letter, or agreement, for or relating to the sale of goods, wares, and merchandise." Then this instrument, being a conveyance relating to the sale of goods, would *have been

within the exemption and required no stamp, if it did not also embrace the transfer of fixtures. The plaintiff's counsel argued, that, so far as related to the fixtures, it could only operate as an agreement, that in future the party should exercise some power of removal, and that, until that power was exercised, it was wholly inoperative to transfer the property. But the case of *Thompson* v. *Pettitt* shows that it operates as a conveyance at the instant of the right and title to the fixtures, that is, to such things as a tenant might remove, and, moreover, that it gives such a property in the chattels that the owner might bring trespass against any person who afterwards removed them. This instrument, though it uses words in the past tense, is the record of an agreement between the parties, that from its date the purchaser shall have full right of removing the fixtures; and it is a transfer, and not an instrument within the exemption as to goods, wares, and merchandise. If an Act of Parliament had said, that in future no fixtures or stock-in-trade should be transferred except by writing, this instrument would satisfy the statute; and if so, it is a transfer under the Stamp Act. Were we to hold, that, whenever parties use the past tense, the instrument must be construed as a mere memorandum, we should be opening a door for exempting all conveyances from stamp duty.

ALDERSON, B., concurred.

ROLFE, B.:

The fact of the instrument being in the past tense, amounts to nothing; for when parties execute a deed, they write, "In testimony whereof the parties hereunto have set their hands and seals."

PLATT, B., concurred.

Rule absolute.

BLACKBURN AND OTHERS *v.* SMITH.

1848.
June 26.
July 11.

(2 Ex. 783—792; S. C. 18 L. J. Ex. 187.)

[783]

By agreement in writing, the defendant agreed to sell, and the plaintiff to purchase, a piece of land, and to pay part of the purchase-money down, and the remainder on a future day; and it was agreed that the plaintiff should have immediate possession, and that the defendant should furnish the plaintiff with a full and sufficient abstract of title to the land, and, upon payment of the balance of the purchase-money, a conveyance of the fee-simple should be made: that all objections to, and requisitions in support of, the title, not delivered in writing in a month after the delivery

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of the abstract, should be deemed to be waived. The plaintiff paid the deposit, and took possession of the land. The defendant, in due time, delivered an abstract, containing a statement of all the deeds, &c., in his custody, power, or knowledge, but tracing the title for a period less than sixty years, and showing it to be in a trustee. No objection was made within the month. Afterwards the trustee died intestate; and it not appearing in whom the legal estate vested, the plaintiff gave notice that he rescinded the contract, and brought an action to recover back the deposit, and, in one count of the declaration, declared specially on the agreement, and assigned as a breach the non-delivery of a "full and sufficient abstract" of the defendant's title to the land, which was traversed by a plea. The second count was for money had and received: Held, that, no objection having been made within the month, the issue was satisfied by the abstract delivered, it having been a full and fair statement of all the muniments which the defendant had in his possession, power, or knowledge, and a fair statement of the deduction of his title, though it did not go back sixty years.

Also, that the plaintiff could not rescind the contract and recover the deposit under the count for money had and received, inasmuch as, having taken possession of the land, the parties could not be placed *in statu quo*.

ASSUMPSIT. The first count of the declaration stated, that, by a certain agreement in writing, dated the 10th of December, 1844, between the defendant of the one part, and the plaintiffs of the other part, and signed by the plaintiffs and defendant respectively, it was witnessed (amongst other things), that, in consideration of the sum of 18*s.* 6*d.* for every square yard of land, which the land thereinafter described should, on admeasurement, be found to contain, to be paid as thereinafter mentioned, the defendant agreed to sell to the plaintiffs, and the plaintiffs agreed to purchase, all the piece of land in the said memorandum of agreement particularly described; and the plaintiffs thereby agreed to pay unto the defendant the sum of 150*l.*, part of the purchase-money for the land, on the signing of the memorandum of agreement, and the remainder of the purchase-money on or before the 2nd of December, 1846, and also to pay the defendant interest on the balance of the purchase-money, at the rate of 4*l.* per cent. per annum, to commence from the 2nd of June then next, by equal half-yearly payments in each year, the first of such payments to be made on
[*784] the 2nd of December, 1845: and the defendant *thereby agreed, that the plaintiffs should have immediate possession of the said land; and forthwith, at his own expense, to furnish the plaintiffs with a full and sufficient abstract of the title to the said land; and that, upon payment of the balance of the purchase-money and interest, a good and valid conveyance of the fee-simple and inheritance of the said land, free from incumbrance, should be made and executed to the plaintiffs, their heirs or assigns, or as they should

direct, by the defendant and all other proper and necessary parties, such conveyance to be prepared by and at the expense of the plaintiffs: and it was further agreed, in and by the said memorandum of agreement between the parties thereto, that the costs of all attested official and other copies of, or extracts from, any writings required to accompany the title, should be paid by the plaintiffs; and that all objections to, and requisitions in support of, the title, not delivered in writing within one month after delivery of the abstract, should be deemed to be waived, and the non-delivery of any objections within that time should be an acceptance of the title: Provided always, and it was thereby agreed, that, in case there should be any restrictions in the title which should prevent the plaintiffs from building a school-house, and carrying on a day-school on the said land, the plaintiffs should be at liberty to vacate the said contract, and, in that case, the deposit should be returned to them: and it was thereby agreed between the parties thereto, that, in case default should be made in payment of the balance of the purchase-money, or the interest thereof, at the times therein-before appointed for payment thereof, it should be lawful for the defendant, his heirs, executors, or administrators, whenever and in such manner as he or they should think fit, to re-enter and repossess the said land, and all buildings thereon made by the said purchasers, and to re-sell the same, or any part thereof, at such price as he might think a fair value for the same, and convey the part or parts sold *to the purchasers thereof, his, her, or their [*785] heirs or assigns, as he, she, or they might direct; and that all such sales should be valid and binding on the plaintiffs and their heirs or assigns; and that the receipt or receipts of the defendant should be a sufficient discharge for so much of the purchase-money as should be therein expressed to be received: and the plaintiffs thereby agreed, that the defendant should stand possessed of the said purchase-monies, in trust to pay off the expenses of such sale or sales as aforesaid, and all charges incident thereto, and the balance of the said purchase-money and interest then due to him, and to pay the surplus monies, if any, to the plaintiffs, their executors and administrators. The count then alleged mutual promises, and contained averments of the payment of the deposit of 150*l.*, of the plaintiffs' readiness to perform their part of the agreement, and the lapse of a reasonable time; and assigned as a breach, that the defendant did not nor would forthwith, nor within such reasonable time as aforesaid, although he was then, and at

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and within such reasonable time as last aforesaid, to wit, on the 1st of September, 1846, requested by the plaintiffs so to do, at his own expense, or otherwise, furnish the plaintiffs with a full and sufficient abstract of the title of him, the defendant, to the said land; but he the defendant then wholly neglected and omitted so to do, and hath not ever furnished the plaintiffs with a full or sufficient abstract of title as aforesaid. There was also a count for money had and received.

Pleas: *Non-assumpsit* to the whole declaration; and to the first count, that the defendant did forthwith, to wit, on &c., furnish the plaintiffs with a full and sufficient abstract of title. Upon which issues were joined.

At the trial, before Rolfe, B., at the Liverpool Spring Assizes, 1848, it was proved that the parties entered into the agreement, which was dated the 10th December, 1844, and that the plaintiffs then paid to the defendant the deposit of 150*l*. The land, which [*786] was described in the agreement *as situate on the north side of Upper Queen Street, Liverpool, was a plot of building land lying waste and uninclosed; and the plaintiffs so far took possession of it as to put up a board containing a notice that the land was for sale, and referring applicants to them. In February, 1845, the defendant delivered to the plaintiffs an abstract of title in two parts, one containing the title of T. Webster to some freehold and copyhold land. The title to the copyhold was traced down from 1766 to 1816, when the copyhold was enfranchised. The abstract did not disclose any title to the freehold anterior to 1816. Reference was made to a map or plan of the land in one of the deeds abstracted. The other part of the abstract showed an agreement by one Forshaw, therein described as the surviving devisee of T. Webster, to sell to the defendant part of the same land, corresponding with that mentioned in the agreement between the plaintiffs and defendant. The abstract did not disclose any evidence of the deaths of the co-trustees of Forshaw. No objection, in writing or otherwise, was made within a month after this abstract was delivered. In October, 1845, Forshaw died, having made his will; and it was supposed that the legal estate was in his devisee. It appeared, however, on investigation, that the will did not dispose of his trust property; and some difficulty arose in tracing his heir-at-law. The conveyance was in consequence delayed; and in January, 1847, the plaintiffs formally gave notice that they rescinded the contract, and demanded back the purchase-money. It was contended on behalf of the plaintiffs, that the

defendant had not delivered a "full and sufficient" abstract of title, and that they were entitled to recover back the deposit of 150*l.* under one or other of the counts. On the part of the defendant it was contended, that the plaintiffs could not rescind the contract, as they had taken possession of the land. The learned Judge was of opinion, that the agreement imported only that the defendant should *deliver an "abstract of such title as he had at the time," [*787] and his Lordship directed a verdict for the defendant, reserving leave for the plaintiffs to move to enter a verdict for them.

Baines, in last Easter Term, obtained a rule *nisi* accordingly; against which

Crompton showed cause (June 26):

First, the breach alleged in the first count is the non-delivery of a full and sufficient abstract of title. That means a full and sufficient abstract at the time of its delivery. This abstract traced the title down to Forshaw, and it then showed that Forshaw contracted with the defendant to sell him part of the land corresponding with that mentioned in the agreement. No objection is made within the month, and the subsequent death of Forshaw could not render the abstract imperfect, if it were sufficient at the time of its delivery.

(PARKE, B.: The terms, "full and sufficient abstract of title," cannot mean "a full and sufficient marketable title," otherwise there would be no reason for the stipulation requiring all objections to be taken within the month.

PLATT, B.: The parties provide, that, if no objection is made within the month, the vendees are to be deemed to have accepted the title; that must mean an objectionable title.)

If the plaintiff had shown that the documents were not truly abstracted, or that they did not apply to the land in question, or that they were not the whole of the muniments in the defendant's possession, or any similar defect, the case might have been different; but this agreement is satisfied by the delivery of an abstract identifying the estate, and comprising all the documents in the defendant's possession, power, or knowledge, with a full history of the births and deaths of the material parties, and other facts, so as fairly to deduce the title.

Secondly, the plaintiffs cannot recover on the count for money [788] had and received. It is well established, that a deposit cannot be

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recovered back under that count, unless the contract has been put an end to, and the parties placed *in statu quo: Hunt* v. *Silk* (1). Where the vendee has taken possession, he must declare specially on the contract. Here part of the consideration was, that the plaintiffs should have possession, and they have enjoyed some of the mesne profits, for they have had the power of selling or endeavouring to sell the land. It may be difficult to compute the value of the plaintiffs' occupation, but something must be deducted from the amount of the deposit.

(PARKE, B.: Whether it was of value to the plaintiffs or not, at all events, the defendant has been deprived of the use of the land.)

Bird and *Atherton*, in support of the rule:

First, a "full and sufficient abstract" of title must show the quantity and quality of the estate, and in whom vested, tracing the title for sixty years, so that the purchaser may be able to prepare the conveyance; and, in addition, the vendor must prove that the abstract is true: *Cooper* v. *Emery* (2), *Wynne* v. *Griffith* (3). This abstract showed no title to the freehold land anterior to 1816.

(PARKE, B.: No doubt that is a defect in the title, as disclosed on the abstract, but is it one in the abstract? With such a stipulation as this agreement contains, it is clearly unnecessary to make an unobjectionable title on the face of the abstract; but the question is, what is the limit the other way?—must the vendor disclose a colourable title for sixty years?)

He is bound to do so, in order to comply with the term "sufficient abstract" of title.

(ALDERSON, B.: A vendor must truly, fairly, and in all material parts abstract the title which he possesses, and must show, by good
[*789] and sufficient evidence, *that the abstract is true, and that being true it gives a good title. But all that is necessary in the first instance, in order to make a good and sufficient title, is to state truly, and in all material parts abstract, the title which the vendor has.

ROLFE, B.: The term "full and sufficient abstract," means full and sufficient abstract of such title as the vendor possesses.)

(1) 7 R. R. 739 (5 East, 449).
(2) 1 Ph. 388.
(3) 1 Russ. 283.

This is not a perfect abstract of the title which it purports to show, for it does not disclose in whom the legal estate vested on the death of Forshaw: *Wynne* v. *Griffith* (1). If the stipulation as to a full and sufficient abstract had stood alone, it could hardly be contended that there was any compliance with it. Then, to what extent is the general qualification to be restrained by the subsequent provisions? The Court will, if possible, so construe the contract as to give effect to every part of it. If the construction contended for on the other side is to prevail, the subsequent stipulations in the agreement would be rendered nugatory; for the vendor might deliver an abstract alleging any sort of colourable title, and in the absence of objection within the prescribed period, the purchaser would be bound to accept it.

(PLATT, B.: The abstract may be sufficient, though the title is defective.

ROLFE, B.: Suppose a title is traced down to A. B., and then it is shown that A. B. died intestate and unmarried, and that the vendor took possession as his illegitimate son, that would be a bad title, but a perfectly good abstract. If a vendor fairly abstracts the whole title on which he relies, how can he do more?)

A full and sufficient abstract of title means a perfect abstract of a marketable title, and the non-delivery of such an abstract absolved the plaintiffs from the obligation of making objections within the stipulated time: *Tanner* v. *South* (2).

(PARKE, B.: In that case the question was, whether the objections were delivered within the stipulated period of ten days, and that depended *upon whether the last day was to be reckoned inclusive or exclusive—no doubt the latter.) [*790]

Secondly, the vendee had a right to rescind the contract.

(PARKE, B.: How can he rescind when he has had possession of the land? There can be no rescission of the contract, unless the parties can be placed *in statu quo*.)

The mere taking possession is immaterial, unless it appears *quo animo* it is done. The period for the completion of the purchase being a distant day, it was arranged that the plaintiff should have

(1) 1 Russ. 283. (2) 4 Jur. 310.

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immediate possession; but the parties could never have intended by that to waive their rights. In *Hunt* v. *Silk*, the lessee continued in possession after the expiration of the period for the completion of the contract.

Cur. adv. vult.

The judgment of the COURT was now delivered by

PARKE, B.:

In this case an action was brought by the plaintiffs, the purchasers, on a contract by the defendant for the sale of some land near Liverpool. The agreement stipulated that the plaintiffs should have immediate possession, should pay part of the purchase-money down and the balance afterwards, and that the defendant should furnish the purchasers with a full and sufficient abstract of the title to the said land; and, on payment of the balance of the purchase-money and interest, a good and valid conveyance of the fee-simple and inheritance, free from incumbrance, should be made and executed to the purchasers by the defendant and all other proper and necessary parties, such conveyance to be prepared at the expense of the purchasers; and it was agreed that all objections to and requisitions in support of the title, not delivered in writing in a month after the delivery of the abstract, should be deemed to be waived, and the non-delivery of objections in that time should be deemed an *acceptance of the title. The breach assigned in the special count of the declaration was the non-delivery of a full and sufficient abstract, and that allegation was traversed. There was also a count for money had and received, to which the general issue was pleaded.

[*791]

It appeared on the trial, before my brother Rolfe, at Liverpool, that an abstract of the title of the defendant was delivered in due time, in two parts, one containing the title of Thomas Webster to some freehold land and some copyhold, enfranchised in 1846, and another, containing an agreement by one Forshaw, therein represented as surviving devisee of Webster, to sell to Smith, the defendant, part of the same land, corresponding with that mentioned in the agreement between the plaintiffs and defendant. It was not alleged that these abstracts did not contain a statement of the contents of all the deeds and instruments in the defendant's custody, power, or knowledge; but it was contended, notwithstanding, that the abstract was insufficient. My brother ROLFE thought it was not, and directed a verdict for the defendant,

reserving the point, which was argued before us fully by *Mr. Crompton* and *Mr. Bird*. BLACKBURN v. SMITH.

It was not disputed, that in this agreement the terms "full and sufficient abstract of the title," did not mean a full and sufficient abstract of a complete marketable title, for the context showed that the parties contemplated an abstract to which objections might be made. The defendant contended, that, if the abstract identified the estate, and comprised all the documents he had in his possession, power, or knowledge, and a full history of the births and deaths of the material parties, and other facts to show the deduction of title to himself, or a trustee for himself, it was as full and sufficient as the agreement required.

The plaintiffs insisted that this was not enough: that it ought to contain a reasonably accurate description of the *property, and a [*792] statement of a sixty years' title to the freehold, which would in this case include the lord's title to the manor whereof the copyholds were held; and further, that the vendor must prove the statements to be true, by proper evidence; which last proposition was not disputed; but this was said, and truly, to belong, not to the abstract, but to a subsequent stage of the investigation of the title.

We think the abstract was sufficient, within the meaning of this issue, as it must be taken to have been a full and fair abstract of all the muniments which the defendant had in his possession, power, or knowledge, and a fair statement of the deduction of his title, though it did not go back for sixty years. Whether an abstract containing less than what this did would have been sufficient under this contract, it is unnecessary to say.

The want of an abstract of the title to the manor before 1816 would have been a good objection, if made within a month, but not having been so made, it was waived. And with respect to the identity of the land, we think that the abstract referring to a map or plan in one of the deeds abstracted, affords sufficient means of identification. We are not aware that a map or plan is ever deemed to be necessary as a part of an abstract. We are therefore of opinion that the breach alleged was not proved, and that my brother ROLFE's opinion was correct.

Further, we think, on the principle of the case of *Hunt* v. *Silk*, inasmuch as the plaintiffs had the possession of the property, and the parties could not be placed *in statu quo*, the count for money had and received cannot be maintained, supposing that the defendant had been guilty of a breach of contract subsequent to

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the delivery of the abstract. We have not now to decide whether such a breach has been committed. If it was, the plaintiff's remedy is on the contract.

Rule discharged.

IN THE EXCHEQUER CHAMBER.

WAINMAN *v.* THE EARL OF ROSSE.

(2 Ex. 800.)

[See 69 R. R. 851.]

JONES *v.* CHAPMAN AND OTHERS (1).

(2 Ex. 803—833; S. C. 18 L. J. Ex. 456.)

1847. *Dec.* 1, 2. 1849. *June* 18.

[803]

Under the plea to a declaration in trespass *qr. cl. fr.*, that the close in the declaration mentioned was not, at the time when &c., the close of the plaintiff, the defendant may show a lawful right to the possession of the close, either in himself or in some other person under whose authority he claims to have acted. So held on error in the Exchequer Chamber, per WILDE, Ch. J., COLTMAN, J., MAULE, J., ERLE, J., and WILLIAMS, J.: *dissentientibus* COLERIDGE, J., and WIGHTMAN, J.

TRESPASS. The first count of the declaration stated, that the defendants, to wit, on &c., with force and arms broke and entered a certain dwelling-house of the plaintiff, in the county of Denbigh, and there forced and broke open and damaged the outer door thereof, &c. There was a second count for another similar trespass on a different day. The defendants pleaded, first, Not guilty; secondly, to the first count, that the said dwelling-house in that count mentioned was not, at the said time when &c., the dwelling-house of the plaintiff *modo et formâ*. The third plea, to the second count, was a similar traverse. Upon these pleas the plaintiff joined issue. There were also pleas to both counts, that the dwelling-

[*804] house in the declaration *mentioned was the dwelling-house and freehold of one Harriett Myddelton; to which there were replications of a demise by her to the plaintiff from year to year, and rejoinders thereto of a determination of the tenancy by notice to quit, before the time of the committing of the alleged trespasses: and issues were taken upon these rejoinders.

(1) The judgment of MAULE, J., was cited with approval in *Lows* v. *Telford* (1876) 1 App. Cas. 414, at p. 426 (*S. C.* 45 L. J. Ex. 613). See also per Lord BLACKBURN in *Bristow* v. *Cormican* (1878) 3 App. Cas. 641, 661, and per DAVEY, L. J., *Ramsay* v. *Margrett* [1894] 2 Q. B. 18, 27, 63 L. J. Q. B. 513. As the decision largely turned on the construction of an obsolete rule of pleading, some of the judgments are omitted.—J. G. P.

At the trial of the cause, before Parke, B., at the Summer Assizes for the county of Denbigh, in 1845, the plaintiff launched his case by proving that he had been in actual possession of, and had resided in, the house in question for about ten years before and up to the time of the alleged trespasses. The defendants then proved that the house was the freehold of Harriett Myddelton; that the plaintiff had occupied it as her tenant from year to year; that the tenancy had been properly determined before the time of the trespasses; and that the defendants had entered as her servants and by her authority and command. Upon this evidence the learned Judge was of opinion that the defendants were entitled to a verdict, not only upon the issues raised on the pleas of *liberum tenementum*, but also upon those raised by the second and third pleas; and he directed the jury, that, upon those issues, the proper question for their consideration was, whether, at the times of the committing of the alleged trespasses, the plaintiff was lawfully in possession of the said dwelling-houses, as against Miss Myddelton; and that, if the defendants had by their evidence satisfied them, that, at the time of the trespasses, the said Harriett Myddelton was lawfully entitled to the possession, and that the defendants, as her servants, and by her authority and command, then committed the trespasses, in such case the second and third issues ought to be found for the defendants. To this ruling the plaintiff's counsel tendered a bill of exceptions. The defendants had a verdict upon those issues, upon which judgment was signed in the Court below; and the plaintiff thereupon brought a writ of error. The grounds of error relied on by *the plaintiff (after setting out the above direction, and [*805] alleging the same to be a misdirection in point of law), stated that the learned Judge ought to have directed the jury, that, upon the evidence so given as aforesaid, the said issues ought to be found for the plaintiff, if the jury were satisfied thereby that the plaintiff, at the several times when &c., was in the actual possession of the said dwelling-house in which &c.

The case was argued (1) on the 1st and 2nd of December, 1847, by

Welsby, for the plaintiff in error. * * *

Peacock, contrà. * * * [808]

Welsby, in reply. * * * [811]

Cur. adv. vult.

(1) Before Wilde, Ch. J., Coleridge, J., Coltman, J., Maule, J., Wightman, J., Erle, J., and Williams, J.

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The COURT being divided in opinion, the learned Judges now proceeded to give their judgments *seriatim*.

WILLIAMS, J.:

The question in this case arose on a bill of exceptions, tendered at the trial before Parke, B. The action is in trespass for breaking and entering the plaintiff's dwelling-house; and the defendants had pleaded (amongst other pleas) that the dwelling-house mentioned in the declaration was not, at the said time when &c., the dwelling-house of the plaintiff, *modo et formâ*; on which issue had been joined. The learned Baron told the jury, in effect, that they ought [*812] to find this issue for the defendants, *if they (the jury) were satisfied, by the evidence of the defendants, that, at the said time when &c., one Harriett Myddelton was entitled to the possession of the dwelling-house, and the defendants had committed the alleged trespasses under her authority.

To this direction the plaintiff excepted, insisting that, upon this issue, the Judge should have directed the jury to find for the plaintiff, if they were satisfied by the evidence that at the time when &c. he was in the actual possession of the dwelling-house.

The general question is thus raised for our decision, as a court of error, whether, under a traverse of the allegation in a declaration in trespass *quare clausum fregit*, that the close was the close of the plaintiff, the defendant is or is not at liberty to show title in himself or some other person, under whose authority he claims to have acted. And I am of opinion that he is.

I have not formed this opinion without hesitation, because it is in direct opposition to the judgment of the Court of Queen's Bench, in *Whittington* v. *Boxall* (1). But on consideration of that judgment, and of the authorities and reasoning on which it is founded, it appears to me to have been wrongly given.

The question turns on the construction of the New Rules of Pleading, H. T., 4 Will. IV. Before those rules, it had long been settled law, that, under the general issue of "Not guilty," in trespass *quare clausum fregit*, the defendant might give evidence of title in himself, or in another by whose command he entered. The case of *Argent* v. *Durrant* (2) shows conclusively the establishment of this doctrine; and also discloses the principle on which it was founded, viz. that the evidence falsified the declaration of the

(1) 5 Q. B. 139. (2) 8 T. R. 405.

plaintiff, inasmuch as it proved that the defendant did not break the plaintiff's close, as the declaration set forth.

Thus it appears, that, at the time the new rules were made, the general issue, in trespass *quare clausum fregit*, by reason of its traversing the allegation in the declaration, that the close in which &c. was the close of the plaintiff, operated as a denial, not only of his possession, but also of his right of possession, as against a defendant lawfully entitled thereto. [813]

But by the rule of H. T., 4 Will. IV., in trespass, it is ordered, that in "actions of trespass *quare clausum fregit*, the plea of 'Not guilty' shall operate as a denial that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially."

The alteration, then, which this rule introduces, appears to be this—that the defendant, if he intends to deny the plaintiff's possession or right of possession, must, instead of denying it as heretofore by the general issue, deny it by traversing it specially.

It must be confessed, that the language employed in this rule is not very happily chosen; for the expression, "special traverse," usually bears a particular technical sense (viz. that of a traverse consisting of an inducement and an *absque hoc*), in which it is scarcely possible it can have been intended to be here used.

What is meant, as I understand, by the rule in this respect is, merely, that in order to enable the defendant to dispute, if he is a wrong doer, the possession, of if he claims title, the right of possession, the allegation in the declaration, that the close in which &c. is the close of the plaintiff, must be denied specially by a particular traverse, in contradistinction to being denied generally, as theretofore, by the plea of "Not guilty."

It is true that, by the terms of the rule, taken literally, it is not this allegation, but the plaintiff's possession or right of possession, which is to be traversed. But it is a principle of pleading, that a defendant cannot traverse any *matter which is not alleged or necessarily implied in the declaration; and possession, or right of possession, is only alleged or necessarily implied, in a declaration in trespass *quare clausum fregit*, as being asserted in the allegation that the close in which &c. is the close of the plaintiff. [*814]

If this be so, then the defendants in the present case, inasmuch as by the plea in question they have denied the plaintiff's allegation, that the dwelling-house in which &c. was his dwelling-house, have

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specially traversed the plaintiff's right of possession thereof, within the meaning of the new rules, and have put themselves into the same position as that in which they would have been before the new rules, if they had traversed it generally by pleading "Not guilty;" and they are consequently at liberty to show title in themselves or in another under whose authority they acted.

For these reasons, I am of opinion that the Judge's direction at the trial was correct; and that our judgment on this writ of error ought to be for the defendants.

ERLE, J.:

I am of opinion that the direction excepted to was right, and that the defendants were entitled to the verdict upon the issues joined upon the second and third pleas, upon proof that they or those under whom they claimed were entitled to the possession at the time of the alleged trespass. * * *

[815] WIGHTMAN, J., [in a dissenting judgment, gave his reasons for holding that the defendant ought not to have been allowed to prove title in Harriett Myddelton, and that he entered as her servant and by her command, under a traverse that the dwelling-house was not the dwelling-house of the plaintiff].

[820] MAULE, J.:

I am of opinion in this case, that the direction given by the learned Judge at the trial was right. The plaintiff in error complains that the learned Judge misdirected the jury in point of law, in stating to them that the proper question raised for their consideration by the second and third pleas was, whether, at the several times when &c. the plaintiff was lawfully in possession of the dwelling-house in which &c., or did the defendants, by their evidence, satisfy the jury, that, at the several times when &c. one Harriett Myddelton was lawfully entitled to the possession, and that, at the times when &c. the defendants, by her authority and command, committed the alleged trespasses in the first and second counts of the declaration mentioned? Now it seems to me that the learned Judge was right, and that the direction which he actually gave, adverting to the point suggested by the plaintiff in error, is in effect and substance the same as that which the plaintiff in error says ought to have been given, but with this difference, that, under the circumstances of the case, it was more proper in point of form, because it was more full and explicit, and more fitted to point out to

the jury what was their practical duty upon the occasion. The question is, whether, upon the plea of "Not possessed," the defendant can give in evidence a title under a third person, and that the defendant entered in the assertion of that title, by command of that third person? And I think that he can do so, for the following plain reasons.

I agree with the exception of the plaintiff in error, that the question raised by the issue of "Not possessed" is, *whether the [*821] plaintiff was in actual possession or not; but it seems to me, that, as soon as a person is entitled to possession, and enters in the assertion of that possession, or, which is exactly the same thing, any other person enters by command of that lawful owner, so entitled to possession, the law immediately vests the actual possession in the person who has so entered. If there are two persons in a field, each asserting that the field is his, and each doing some act in the assertion of the right of possession, and if the question is, which of those two is in actual possession, I answer, the person who has the title is in actual possession, and the other person is a trespasser. They differ in no other respects. You cannot say that it is joint possession; you cannot say that it is a possession as tenants in common. It cannot be denied that one is in possession, and the other is a trespasser. Then that is to be determined, as it seems to me, by the fact of the title, each having the same apparent actual possession: the question as to which of the two really is in possession, is determined by the fact of the possession following the title,—that is, by the law, which makes it follow the title. There is no doubt that the original plea of "Not guilty," before the new rules, in trespass, was always a mere negative plea, and did not (as it did in some other forms of actions, more particularly in later times, such as the case of assumpsit), enable the defendant to give evidence of any affirmative matter in confession and avoidance, but only enabled him to show circumstances which proved that the facts stated in the declaration, that is, the material facts, were all, or some of them, not true. Now certainly it was not intended, after the new rules, that mere negation—evidence which was merely negative—should be admissible only when that evidence was pleaded. It is true, the new rules limited the effect of the plea of "Not guilty;" but they provided, at the same time, that if the possession, or right of *possession, was intended to be denied,—not [*822] that some matter should be stated which showed that it could be true, but—that it should be specially traversed, which does not

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mean traversed by the plea which pleaders sometimes call a special traverse, that is to say, a plea introducing certain affirmative matter, and then concluding "without this, &c.," and so traversing; but a special traverse is understood there, as it is used by Lord Coke in Coke upon Littleton (1), as contrasted with a general traverse, such as a general traverse of "Not guilty," which denies everything material as alleged in the declaration, in some cases at common law; but a traverse of one particular thing in the declaration, such as a traverse of possession, or a traverse of having done the thing complained of, or any other traverse of any one material fact, although not introducing any special matter by way of recital, is a special traverse within the proper meaning of those words, as used elsewhere, and as they are here used in these new rules. The meaning, therefore, of the possession, or right of possession, being "specially traversed," is simply this,—that, in future, the denial shall not be involved in the term of "Not guilty," which before denied the doing of the act complained of, and also the possession or right of possession of the plaintiff; but that if the possession, or right of possession, is denied, that must be done by a denial restrained to the allegation in the declaration which makes the possession, or right of possession, matter of proof on the part of the plaintiff; by which denial you put properly in issue the allegation that was denied by "Not guilty," *inter alia*, and which denial by the term "Not guilty," enabled certain evidence, in respect of title, to be given upon both sides. That is no longer to be given under "Not guilty;" but is to be given under the traverse of the allegation in the declaration under which *the right of possession, or the actual possession, may be brought into question; that is, the allegation that the close was the plaintiff's. Then, where there is a traverse that the close was the plaintiff's, we are remitted to the ordinary rules of pleading and evidence, by which you are enabled to give in evidence on the part of the defendant, when he denies the allegation of the plaintiff, any matter affirmative or negative of what description soever, provided the result of it be to show that the allegation which is denied is not a true allegation. There can be no doubt, as it seems to me, that, if you can show that the house or land which the plaintiff has shown in evidence to have been apparently in his possession was a house or land that really was not in his possession, you have shown what, according to the ordinary rules of evidence—if before the new

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(1) Co. Litt. 261 a.

rules the same issue had been taken, which, I apprehend, might have been taken—you might have denied. A defendant was not compelled to plead "Not guilty;" he might have pleaded that the close was not the close of the plaintiff. Supposing that had been pleaded, he might at all times have shown that it was not the plaintiff's, by showing that it belonged to somebody else; and I have before observed, that you do show the possession is not the plaintiff's, but some third person's, when you have shown that such third person had a title, and asserted it before or at the time when he committed the trespass in question, by actual entry, so as to vest the possession in that third person. I therefore think that, before the new rules, if such evidence had been offered, and therefore since the new rules, such evidence would be admissible. I do not find any difficulty in the matter. It has been treated as if it were a sort of *reductio ad absurdum*, that, if the law should be held as the learned Judge held at the trial, and as many other Judges on many former occasions have held, it would follow that the new rules have not perfectly attained that *which was one of their [*824] objects. Suppose it were so—suppose one object of the new rules really was especially to cause a matter of this kind to be pleaded; if they had failed in doing that, it would only prove that the new rules were not perfect. If, which I altogether dispute, it was the object of the new rules, absolutely and entirely, for every purpose and to an unlimited extent, to prevent any surprise on the part of one party as to the case to be made at the trial by the other, they have constantly failed in that object; and it was impossible they should not, if they did anything short of this, namely, ordering that each party should state in pleading the evidence by which it was his intention, and by which alone he should be enabled, to support his case at the trial. If that were so, then that which is assumed by some, and by those who complain of this judgment, to have been the object of the new rules, might have been attained; but short of that it could not possibly be attained. Take any plea you can think of—for instance, take *non est factum* or *non assumpsit*, or that the defendant did not make the promissory note or bill of exchange, or any matter of mere denial; it is impossible to say beforehand what will be the evidence—on what points positive and affirmative matters of fact may be given in evidence by the party who makes the denial, in order to show that the fact which he denies is not true; and until the mode of pleading which I have suggested—that is, pleading the evidence—shall be adopted, there

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always must be that possibility of surprise. Therefore, it seems to me, that unless you were to say that no person, on an issue joined which denies any matter of fact, shall be at liberty to prove any affirmative matter whatever in evidence, in order to show that the matter affirmed on the other side, and denied by him, is not true—unless you are to provide that—the necessary consequence will be that which I have before described; and so to provide would, I think, be a practical and legal absurdity. On the simple ground, therefore, of the actual possession being the matter in issue, and

[*825] the legal *right to possession, when accompanied by the assertion of it before and at the time of the trespass, constituting actual possession on the part of the person so having that right, and therefore negativing the actual possession of the plaintiff, it appears to me that all matters, affirmative or negative, which tend to show either of those propositions, namely, the actual possession and the right to possession of a third person, and the assertion of that right (for that is essential to this defence) at or before the time of the trespasses complained of, so as to divest the right out of the plaintiff,—that any matter of that kind, upon principle, and quite consistently with all the authorities, and without infringing upon either the letter or spirit of the new rules, may be properly given in evidence on such a traverse as this. Upon these grounds, I think the direction on this occasion was a correct and proper direction, and therefore that the judgment ought to be affirmed.

COLTMAN, J., [delivered a judgment giving his reasons for thinking that the direction of PARKE, B., was a proper direction, and that, therefore, the judgment ought to be affirmed].

[828] COLERIDGE, J.:

In this case to a declaration in trespass for breaking and entering the plaintiff's dwelling-house, the defendant pleaded, secondly, that the dwelling-house, at the said time when &c., was not the dwelling-house of the plaintiff; on which issue was joined. There was a plea also to the same count, which alleged the dwelling-house to be the freehold of one Harriett Myddelton, and justified under her.

Upon the trial, the plaintiff proved an actual possession of the dwelling-house at the time of the committing the alleged trespass, and for several years before. The defendants proved that the dwelling-house was the freehold of Harriett Myddelton, and that

the plaintiff's occupation was that of tenant from year to year; but that his tenancy had been duly determined by notice to quit before the time of the trespass committed, and that they, the defendants, had entered by command of Harriett Myddelton. The learned Judge, in directing the jury on the issue raised by the second plea, told them that the question raised by it was, whether, at the time of the trespass committed, the plaintiff was lawfully in possession of the dwelling-house, and that, if the defendants had satisfied them that, at that time, Harriett Myddelton was lawfully entitled to the possession, and that they, as her servants and by her command had committed the alleged trespass, then the issue ought to be found for them. To this direction an exception was taken, the validity of which is now to be decided. The question which is now raised, and upon which it seems impossible to reconcile the reported decisions, turns upon the construction to be put upon the following, among the new rules of pleading: "In actions of trespass *quare clausum fregit*, the plea *of 'Not guilty' shall operate as a denial [*829] that the defendant committed the trespass alleged in the place mentioned, but not as a denial of the plaintiff's possession or right of possession of that place, which, if intended to be denied, must be traversed specially." This rule must be construed on the same principles as we should apply in construing any other language. It relates to pleading, and we must, therefore, bear in mind the rules of pleading; but it is also intended arbitrarily to alter existing rules of pleading, and therefore we must not be fettered by them. I own, speaking with deference, that it seems to me that much ingenuity and learning have been somewhat misemployed on that question, from neglecting this consideration. The rule was not framed because the current of decisions had given a wrong effect to the plea of "Not guilty;" but because the right effect was found inconvenient, and a new and more limited effect was now to be given, although the acknowledged and strictly correct rule should thereby be broken in upon. An interpretation of the new rule will not, therefore, necessarily be wrong, because it breaks in upon any such rule. If the words, fairly considered, lead us to that conclusion, we ought to adopt it, concluding that the framers so intended; and, bearing the mischief in mind which the rule was intended to remedy, we ought to lean to that interpretation which most advances the remedy and removes the inconvenience.

If it had been simply provided that "Not guilty" should deny only the committing of the act in the place alleged, pleaders would

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have had no difficulty in knowing how to deal with the remaining allegations, expressed or implied, in the declaration, according as they intended to admit or deny any of them. But the rule goes on to speak of possession and right of possession as two distinct things, either the one or other of which may be affirmed in the declaration, or denied in the plea, and if denied, whichever it may be, provides that such denial must be by special traverse. There *can be no doubt that, considered abstractly, the two things are very different, and may admit of different specific denials; but in every case of trespass *quare clausum fregit*, the plaintiff in his declaration necessarily affirms a possession rightful as against the defendant who disturbs it, in such sense as to make his entry unlawful. It cannot be affirmed that he knows anything of the right or title which may be set up against him, and on which the defendant will rely; the language of his declaration has its ascertained meaning before the defendant's case is disclosed by his plea; and that meaning does not vary according to the greater or less strength of the defendant's title, though the proof required to support it may. If the defendant turns out to be a mere wrong doer, the plaintiff has done enough in proof of a rightful possession when he has proved the mere fact of possession; but he must go on further when title is set up against him; still, in both cases, all that he does allege—and this he must always allege—is the rightful possession against the disturber. And, as this is the case on the plaintiff's part, so on the defendant's,—whenever he admits the fact of trespass in the place alleged, and does not excuse it, his defence must be a denial of a possession rightful as against him, in any such sense as to make his entry unlawful; for, if he does not, he is an admitted trespasser. If, then, the rule had simply prevented the general issue from averring that denial of rightful possession, which, before the framing thereof, the plea of "Not guilty" had included, I should have had no difficulty in saying, that whatever plea properly traversed the possession would have let in any evidence which showed the rightful possession not in the plaintiff, but in the defendant or any one under whom he could justify. This would have been doing merely under the substituted plea what had been allowable under the plea of "Not guilty," which had been *pro tanto* done away with; and in this view, the direction would be clearly right. The declaration has averred a possession rightful *as against the defendant. The defendant denies such a possession, and the evidence offered strictly makes out that denial. But this

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interpretation, it is obvious, leaves more than half the mischief which the rule provided against unremedied. The plaintiff is still left in the dark as to what case he must prepare himself to meet—what evidence he must bring to support his possession; and when it is considered that we are dealing with a rule framed with much care by very learned persons, this is a very strong presumption against the interpretation. And further, if this were all that was intended, the former part of the rule might have stood alone: nothing is gained by the latter. We must, however, treat the latter as added purposely, and as intended to convey specific instruction to the pleader, and also to further the general object of the whole body of pleading rules. The preamble expresses this general object to be, "that the several facts material to the merits of the cause may, before the trial, be brought to the notice of the respective parties more directly than heretofore." This is one of the most useful purposes of all special pleading. The variety of defences which, before the new rules, were covered even in trespass *quare clausum fregit* by the plea of "Not guilty," frustrated that purpose; and this rule was clearly made to remedy the inconvenience. Without the latter half, something, no doubt, would have been effected; but still the pleader would have been at liberty so to plead as to convey no information to the plaintiff, whether the defendant meant to deny simply the bare possession, or, admitting that, to set up a superior title, and so show that it was not, against him, a rightful possession. It seems to me, then, reasonable to suppose that the framers of the rule intended to go further, and to make their remedy complete by compelling the defendant, on the face of his pleading, to distinguish between the two defences; and that it is for this purpose that they have themselves distinguished between possession and right of possession, and have declared, *that whichever of these two the defendant means to deny, he must do so by traversing it specially; that is, in terms so as to inform the plaintiff on which of the two defences he means by the traverse to rely. The expression "traversed specially" cannot be understood technically, as directing a "special traverse;" and I fear it must be admitted that the language is not so careful and precise as was to be desired. But the meaning that I give to the whole sentence is quite consistent with the language, and has the merit at least of effectuating the professed object of the rule, which the construction put on it by the learned Judge not only fails to do, but makes the provision itself redundant and inoperative. Without

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the provision, the pleader would, on general principles, have done the very thing which the rule so construed directs him to do. It may be said that I restrain the full natural meaning of the plea of "not possessed," by restricting it to a denial of the bare possession; and I admit that I do so, and that the position would be difficult to maintain, if tried simply by the ordinary rules of special pleading; but the new rules were framed purposely to modify those; in the first half of the sentence, as I have before observed, this very rule restricts the full natural meaning of "Not guilty." It cannot be denied, that if in terms it had gone on to restrict also the meaning of "not possessed," the framers might have done so consistently with their general purpose, and the course pursued in other parts of what I may call their code. There is, therefore, no objection *à priori* to my interpretation. The only question is, whether the words bear it.

Upon full consideration, I think they do. It is to be understood that we are dealing with language which can neither be interpreted technically nor literally. Two things are mentioned as distinct and different, which may be admitted or denied. The defendant is at liberty to deny both or either; but it is just that the plaintiff should know whether he intends to deny both, or, if not, which.

[*833] The *rule is, that, if he intends to deny either, he must traverse it specially. Those words, it seems to me, may well mean, that he must deny specifically in terms that which he calls on the plaintiff to prove; and I think it unreasonable to suppose the meaning to be, that he may traverse in such terms as leaves it uncertain whether he means to deny one or both, and which, if only one, of the things alleged.

I therefore think the direction of the learned Judge was wrong.

PATTESON, J., said:

I did not hear the case argued; but I have had a communication with the Lord Chief Justice WILDE upon the matter, and he has stated to me what his opinion is; and I will now read it: "I am of opinion that the judgment in this case ought to be affirmed; and as the grounds on which that opinion rests are clearly stated in the judgment of my learned brother WILLIAMS, I do not think it necessary to say more than to refer to that judgment."

Judgment affirmed.

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WORDS—"Burthen." *See* Ferry.

—— "Securities." *See* Will, 17.

—— "Their." *See* Will, 8.

—— "Town." *See* Statute, 2.

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